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Supreme Court, U.S.
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No. 08-489

IN THE

Supreme Court of the United States

MARVIN TAYLOR BARNHILL, ET AL., PETITIONERS

v.

ANN VENEMAN, SECRETARY OF AGRICULTURE FOR THE UNITED STATES ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the government's reliance on legislation enacted by Congress which retroactively targets for elimination—and was designed to avoid----the government's bargained-for obligation to insure the petitioners' destroyed peanut crop at the market rate of $0.31 per quota pound violate the core principles of *United States v. Winstar Corp. et al.*, 518 U.S. 839(1996), *Perry v. United States*, 294 U.S. 330(1935) and *Lynch v. United States*, 292 U.S. 571(1934)?

PARTIES TO THE PROCEEDING

Tom Clements, David Grant, Tim Phelps, Tommy Flythe, Jim Ferguson, Glen Hawkins, Billy Bain, Glen Moore, R.L. Smith, H. Steven Allen, and other North Carolina and Virginia Peanut Farmers similarly situated; Florida Peanut Farmers and others similarly situated; Terry E. Beasley, Wallace A. Berry and other South Carolina Peanut Farmers similarly situated; Texas Peanut Farmers in the Southwest Growing Region; Georgia Peanut Farmers; and Charles E. Smith, Jr.,

Petitioners

Ann Veneman, Secretary of Agriculture for the United States; Ross J. Davidson, Administrator for Risk Management Agency; Risk Management Agency; U.S. Department of Agriculture; United States of America; Federal Crop Insurance Corporation; Mike More, RMA Regional Manager, Valdosta, Georgia; Ron Berryhill, RMA Regional Office Director, Oklahoma City, Oklahoma,

Respondents

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The published opinion of the United States Court of Appeals for the Fourth Circuit in *In re Peanut Crop Ins. Litigation*, MDL-1634; *Barnhill et al. v. Veneman et al.*, Docket Nos. 07-1145 and 07-1146, 524 F.3d 458(4th Cir. 2008), decided May 8, 2008, reversing the United States District Court for the Eastern District of North Carolina at Greenville which certified the petitioners' class action and granted their summary judgment motion on their claim that the government had breached its contract with them to insure their peanut crop losses, is set forth in the Appendix hereto(App. 1-40).

The unpublished and unreported opinion of the United States District Court for the Eastern District of North Carolina at Greenville in *Barnhill et al. v. Davidson et al.*, Docket No. 4:02-cv-00159-H94, filed July 22, 2004, granting the petitioners' summary judgment motion on their claim that the government had breached its contract with them to insure their peanut crop losses, is set forth in the Appendix hereto(App. 41-88).

The unpublished order of the United States District Court for the Eastern District of North Carolina at Greenville in *In re Peanut Crop Insurance Litigation*, MDL-1634, filed December 20, 2006, certifying the class action, adopting a damages formula and appointing class counsel, is set forth in the Appendix hereto(App. 89-94).

The unpublished order of the United States District Court for the Eastern District of North

Carolina at Greenville in *In re Peanut Crop Insurance Litigation*, MDL-1634, filed December 20, 2006, entering a final judgment on liability and damages in favor of the petitioners as class members and against the respondents, is set forth in the Appendix hereto(App. 95).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *In re Peanut Crop Ins. Litigation*, MDL-1634; *Barnhill et al. v. Veneman et al.*, Docket Nos. 07-1145 and 07-1146, denying the petitioners' timely filed combined petition for panel rehearing and for rehearing *en banc*, is set forth in the Appendix hereto(App. 96-97).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit reversing the United States District Court for the Eastern District of North Carolina at Greenville which certified the petitioners' class action and granted their summary judgment motion on their claim that the government had breached its contract with them to insure their peanut crop losses, was entered on May 8, 2008; its further order denying the petitioners' timely filed combined petition for panel rehearing and for rehearing *en banc* was filed and decided on July 8, 2008(App.1;96).

This petition for writ of certiorari is filed within ninety (90) days of July 8, 2008. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

7 U.S.C. § 1502 (Purpose and definitions)

> (a) It is the purpose of this chapter [the Federal Crop Insurance Act] to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.

7 U.S.C. § 1508(c):

> (c) General coverage levels
> (1) Additional coverage generally
>
> (A) In general
>
> The Corporation [Federal Crop Insurance Corporation] shall offer to producers of agricultural commodities grown in the United States plans of crop insurance that provide additional coverage [beyond the insurance offered by private insurers].
>
> (k) Reinsurance
> (1) In general
>
> Notwithstanding any other provision of

this chapter, the Corporation shall, to the maximum extent practicable, provide reinsurance to insurers approved by the Corporation that insure producers of any agricultural commodity under 1 or more plans acceptable to the Corporation.

7 U.S.C. § 1358-1:

(a) National poundage quotas (for peanuts)

(1) Establishment

The national poundage quota for peanuts for each marketing year shall be established by the Secretary [of Agriculture] at a level that is equal to the quantity of peanuts (in tons) that the Secretary estimates will be devoted in each such marketing year to domestic edible use (except seed) and related uses.

(2) Announcement

The national poundage quota for a marketing year shall be announced by the Secretary not later than December 15 preceding the marketing year.

....

(b) Farm poundage quotas

(1) In general

(A) Establishment

A farm poundage quota for each marketing year shall be established—

(i) for each farm that had a farm poundage quota for peanuts for the 1990 marketing year, in the

case of the 1991 through 1995 marketing years, and the 1995 marketing year, in the case of the 1996 through 2002 marketing years;

(ii) if the poundage quota apportioned to a State under subsection (a)(3) of this section for any such marketing year is larger than the quota for the immediately preceding marketing year, for each other farm on which peanuts were produced for marketing in at least 2 of the 3 immediately preceding crop years, as determined by the Secretary; and

(iii) as approved and determined by the Secretary under section 1358c of this title, for each farm on which peanuts are produced in connection with experimental and research programs.

(B) Quantity

The farm poundage quota for each marketing year for each farm described in subparagraph (A)(I) shall be the same as the farm poundage quota for the farm for the immediately preceding marketing year, as adjusted under paragraph (2), but not including any increases resulting from the allocation of quotas voluntarily released for 1 year under paragraph (7).

The farm poundage quota, if any, for each marketing year for each farm described in subparagraph (A)(ii) shall be equal to the quantity of peanuts allocated to the farm for the year under paragraph (2).

....

(e) Definitions

For the purposes of this part and title 1 of the Agricultural Act of 1949 (7 U.S.C. § 1441 *et seq.*):

....

(4) Quota peanuts

The term "quota peanuts" means, for any marketing year, any peanuts produced on a farm having a farm poundage quota, as determined in subsection (b) of this section, that----

(A) are eligible for domestic edible use as determined by the Secretary;

(B) are marketed or considered marketed from a farm; and

(C) do not exceed the farm poundage quota of the farm for the year.

Section 1310(c) of the 2002 Farm Bill (enacted May 13, 2002, repealing the authority for price supports for quota peanuts found in 7 U.S.C. § 7271):

(C) TREATMENT OF CROP INSURANCE POLICIES FOR
2002 CROP YEAR---

(1) APPLICABILITY–This subsection shall apply for the 2002 crop year only notwithstanding any other provision of law or crop insurance policy.

(2) PRICE ELECTION—The non-quota price election for segregation I, II, and III peanuts shall be 17.75 cents per pound and shall be used for all aspects of the policy relating o the calculations of premium, liability, and

indemnities.

(3) QUALITY ADJUSTMENT----For the purposes of quality adjustment only, the average support price per pound of peanuts shall be a price equal to 17.75 cents per pound. Quality under the crop insurance policy for peanuts shall be adjusted under procedures issued by the Federal Crop Insurance Corporation.

7 CFR § 457.2 (Availability of Federal crop insurance):

(a) Insurance shall be offered under the provisions of this section on the insured crop in counties within the limits prescribed by and in accordance with the provisions of th Federal Crop Insurance Act, as amended (the Act)....

(b) The insurance is offered through companies reinsured by the Federal Crop Insurance Corporation (FCIC) that offer contracts containing the same terms and conditions as the contract set out in this part. These contracts are clearly identified as being reinsured by FCIC. FCIC may offer the contract for the catastrophic level of coverage contained in this part and part 402 directly to the insured through local offices of the Department of Agriculture....

7 CFR § 457.134 (Peanut crop insurance provisions):

....

1. Definitions

Base contract price. The price for farmers' stock peanuts stipulated in the sheller contract, without regard to discounts or incentives that

may apply, not to exceed the price election times the price factor specified in the Special Provisions.

....

Price election. In addition to the definition in th Basic Provisions, the price election for peanuts insured in accordance with the sheller contract will be the base contract specified in the sheller contract.

Price factor. The factor specified in the Special Provisions that places limits on the base contract price.

....

4. Contract Changes

In accordance with section 4 of the Basic Provisions, the contract change date is November 30 preceding the cancellation date.

5. Cancellation and Termination Dates

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are: [North Carolina and certain counties in Texas] February 28 New Mexico, Oklahoma, Virginia and all other Texas counties March 15

....

10. Insurance Period

In accordance with the provisions of section 11 of the Basic Provisions, the calendar date for the end of the insurance period is the date

immediately following planting as follows:
(a) November 30 in all states except New Mexico, Oklahoma, and Texas, and
(b) December 31 in New Mexico, Oklahoma and Tezas.

11. Causes of Loss

In accordance with the provisions of section 12 of the Basic Provisions, insurance is provided only against the following causes of loss that occur during the insurance period:
(a) Adverse weather conditions....

STATEMENT

The petitioners ("the Farmers"or "the petitioners") are members of a class who have grown and harvested peanuts in several south and southwestern States for many years and who have applied for and received from the respondents ("the government" or "the FCIC") so-called multiple peril crop insurance for their peanuts for several years prior to the 2002 crop year and for the 2002 crop year itself.

In the wake of the Great Depression and climate anomalies in the South and Midwest in the 1930's, private insurance companies deemed all-risk crop insurance too great a commercial hazard for their undertaking. *Federal Crop Inc. Corp. v. Merrill*, 332 U.S. 380, 383 n.1(1947). Stepping into this vacuum "as a pioneer" in offering crop insurance, Congress enacted the Agricultural Adjustment Act of 1938, now codified at 7 U.S.C.§ 1281(2000), which terminated the free market production and sale of agricultural commodities

within the United States, including peanuts, and created the Federal Crop Insurance Corporation ("the FCIC"), a wholly owned government enterprise within the Department of Agriculture, to carry out the purposes of the Act, i.e., "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance ...." 7 U.S.C. § 1502(a). *Id.* at 381.

In 1941, Congress amended the 1938 Act to regulate the production of peanuts in order to avoid severe fluctuations in price caused by rapid changes in market demand and the year-long lag in response to that demand caused by crop-growing cycles. It did so primarily by implementing quotas set by the Secretary of Agriculture ("the Secretary"). Under the 1941 Act, the Secretary would annually proclaim the "national marketing quota," i.e., the total amount of peanuts which would be made available for marketing the following year, a figure which reflected the average amount of peanuts harvested during the prior five years, adjusted for trends in production and demand.

This national acreage allotment was then divided proportionately among peanut-producing states based on their average relative peanut production for the five years immediately preceding the proclamation year. Each state acreage allotment was subsequently apportioned among the individual farmers in that state. The farms which obtained allotments were farms on which peanuts were grown in any of the three years immediately preceding the year for which the allotment was determined. The state allotments were apportioned on the basis of the tillable land available for the production of peanuts and the past acreage of peanuts

grown on the farm. The actual amount of peanuts produced on this acreage allotment equaled the marketing quota for that particular farm. See generally *Members of Peanut Quota Holders Ass'n v. U.S.*, 421 F.3rd 1323, 1326(Fed.Cir. 2005).

By 1949, the government's regulation of the peanut market began to include price supports and by 1977 technological improvements had substantially increased the yield of peanuts per acre producing an oversupply which prompted Congress to revamp the peanut program by instituting poundage quotas based upon the weight of the peanuts produced by each farm. These new poundage quotas applied only to peanuts for domestic consumption and which did not exceed the poundage quota for a particular farm, i.e., so-called "quota peanuts." The 1977 Act also recognized "additional peanuts" which were any peanuts in excess of a farm's poundage quota but not in excess of the actual production of the acreage allotment. *Id.* at 1327. This different treatment of a farm's peanut crop discouraged overproduction because the price support provided by the government for these "additional peanuts" was substantially lower than for "quota peanuts."*Id.*

Public dissatisfaction with price supports led Congress in 1996 to end direct payments to peanut farmers and to offer instead marketing assistance loans with rates set by the U.S. Department of Agriculture (USDA). The farmers executed non-recourse notes so that if the revenue from the sale of peanuts did not cover the full amount of their loan, the USDA made up the difference. If their revenues covered the loan amount, the farmers paid the loan in full. The 1996 Act

set the loan rate for quota peanuts at $610.00 per ton or $0.31 per pound; and the loan rate set by the Secretary in 1997 for non-quota peanuts was $132.00 per ton.

While this system of government support for peanut farmers was evolving, the government's longstanding "pilot program" for providing multi-peril crop insurance to farmers was crystallizing so that by 1980, Congress enacted a comprehensive federal crop insurance act aimed at discouraging reliance on *ad hoc* disaster relief and providing farmers a "primary source of risk management." See H.R. Rep. 96-430(1979). It expanded the sale of multi-peril crop insurance to all major commodities nationwide while providing a large premium subsidy to each eligible farmer. The Act further directed the FCIC to provide reinsurance to the maximum extent possible to those insurance companies willing to shoulder a portion of the crop insurance risk. See 7 U.S.C. § 1508(e).

When farmers continued to resist participating in this program and resorted instead to *ad hoc* disaster relief for their damaged or destroyed crops, Congress in 1994 enacted the Federal Crop Insurance Reform Act. See 7 U.S.C. § 1508. The Act continued to rely on private insurance companies to offer crop insurance for farmers and directed the FCIC as a reinsurer to provide "free" catastrophic coverage nationwide and additional or "buy-up" coverage with significantly increased premium subsidies and coverage limits. It established the Risk Management Agency ("RMA"), an independent office within the USDA responsible for supervising the FCIC and its enforcement of programs authorized by the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq.*

With this statutory history as background, the petitioners, all of whom have grown and harvested peanuts for many crop years prior to 2002 and for the 2002 crop year itself, applied for and received multi-peril crop insurance from the FCIC for the upcoming 2002 crop year, as they had repeatedly done in prior years. In fact, the contract of crop insurance between the Farmers and the FCIC has been the same since 1996 and by its own terms continued in force for each succeeding crop year unless cancelled or terminated by the Farmers.

Each crop year extends from the Fall/Winter of the preceding year through harvest during the Summer of the subject crop year. As in prior crop years, the Farmers in the Fall and Winter of 2001 entered into numerous contracts with third parties to purchase seed and other materials for planting peanuts during April and May of the 2002 crop year; and they also pursued other financing necessary for their undertaking, using the FCIC's ongoing multi-peril crop insurance coverage of $0.31 per quota pound of peanuts as collateral for these operating loans.

The Farmers pursued these preparations for the 2002 crop year under an established, six-year protocol set out by the insurance contract drafted by the FCIC which made clear that as time passed from the Fall of 2001 through the Spring of 2002, the obligations and rights of the parties thereunder —as well as the terms of the insurance contract itself---became more crystallized and eventually immutable by the time the Farmers began planting their peanuts in April of 2002.

That is, the insurance policy provides that the last date for the government to make any changes in the insurance policy for the 2002 crop year is **November 30, 2001**, and those policy changes include *inter alia* the price election and the amount of insurance(Court of Appeals Joint Appendix 42;45; 56;204;207-209). Consistent therewith, the government on November 30, 2001, established the price election and the amount of insurance for the 2002 crop year of quota peanuts at $610.00 per ton or $0.31 per pound with non-quota peanuts priced at $0.16 per pound, the same as in previous years(J.A. 204;215;225;235).

On **December 14, 2001**, the government announced that the national marketing quota for peanuts was the same as the previous year, i.e., the market price for quota peanuts was $610.00 per ton or $0.31 per pound and non-quota peanuts would be priced at $0.16 per pound, "unchanged from the 2001 level"(J.A.75;204;226;235). The government's announcement also contained the following proviso:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan.
>
> If pending legislation is enacted as law, the 2002 poundage quota and price support announced by this release *may* be altered or rescinded.

(J.A.75)(emphasis supplied). However, the government's announcement *never* indicated that the *insurance coverage* available to the Farmers for their

peanuts in the event of their destruction would change.

This price election was repeated by the government in an announcement on **January 15, 2002** (J.A.77). Furthermore, on **February 15, 2002**, the government announced that

> the national average price support level for 2002 quota peanuts will be $610.00 per short ton, *the same as last year.* That level is mandated for marketing years 1996 through 2002 by the Federal Agricultural Improvement and Reform Act of 1996.

(J.A.204;229;235)(emphasis supplied)..

February 28, 2002, and March 15, 2002, the dates for cancelling or terminating the policy, were reached with neither party cancelling or terminating the contract (J.A. 204;210-212;235). These same dates marked the last time the Farmers could change their crop insurance for the 2002 crop year and the last time the government could provide additional price elections for quota and non-quota peanuts; and those dates passed with the Farmers keeping their insurance intact and the government making no additional price elections(J.A.204;213-214;217-218;235).

Insurance coverage under the policy for this crop of peanuts began on **April 11, 2002,** when the Farmers began planting their peanuts(J.A.204;219-220;223-224;235).On **May 13, 2002**, *after the Farmers had planted most of their peanut crop*, Congress enacted the Farm Security and Rural Investment Act of 2002, 7 U.S.C. §§ 7951-7960 ("the 2002 Farm Bill"), which

eliminated the quota peanut program altogether and, for the 2002 crop year, retroactively reduced the price election and indemnities attendant to both quota and non-quota peanuts to $.1775 per pound.

When drought, an adverse weather condition covered under the insurance policy, caused the destruction of most of the Farmers' peanut crops during the Summer of 2002, the government relied upon the 2002 Farm Bill to pay insurance benefits to the Farmers based upon the new indemnity rate of only $0.1775 per pound of peanuts rather than the bargained-for contract rate of $0.31 per pound.

Alleging these facts and claiming that the government's unilateral modification of its bargained-for duty to insure the Farmers' 2002 crop of peanuts at the market rate of $0.31 per pound for quota peanuts had caused them financial losses, bankruptcy and the loss of their farms, the Farmers brought this civil action on November 19, 2002, against the government in the federal district court for the Eastern District of North Carolina(App. 41). The gist of their claims was that the government's unlawful retroactive modification of its duties as insurer under the 2002 crop insurance policy constituted a breach of contract because this crucial change in insurance coverage was *not* made before the contract's stipulated change date, its cancellation or termination date, its closing date or its initial planting date and was therefore a belated and unlawful unilateral modification of the crop insurance policy unsupported by new consideration.

The Farmers also claimed that the government's change in the contract to their detriment long after

they had begun performing in reliance upon its terms denied them due process of law, violated the principle that such a substantive change in policy be published in the Federal Register, and unlawfully impaired contracts they made with third parties predicated on the bargained-for crop insurance coverage of $0.31 per pound for quota peanuts.

As relief, the Farmers sought certification of their suit as a class action; preliminary and permanent injunctive relief enjoining the government from seeking to enforce its attempt to scale back its insurance coverage for the 2002 crop year from $0.31 to $0.1775 per pound for quota peanuts; and damages in the form of a common fund for all the members of the class based upon the class losses at the rate of $0.31 per pound(App. 41-42).

On July 22, 2004, Senior District Judge Malcolm J. Howard issued a decision certifying the suit as a class action under Fed. R. Civ. P. 23(b)(1)(B) with the class consisting of those district-wide farmers who had insurance coverage on peanuts under the 2002 multi-peril crop policies, who had losses for the 2002 crop year, who settled those losses for $0.1775 per pound and who had been assigned farm poundage quotas for the 2001 crop year(App. 49-60).

Addressing the parties' cross motions for summary judgment, the district judge granted summary judgment for the Farmers on their breach of contract claim against the government(App. 67-72). He rejected the government's argument that because the Farm Service Agency("the FSA"), an arm of the USDA, had failed to assign poundage quotas for any of

the individual farms for the 2002 crop year, as technically required by 7 U.S.C. § 1358-1(a)(2)(2001), those farms could not have had any peanuts eligible to be quota peanuts and the Farmers therefore could not have had insurance at the election level for quota peanuts, i.e., $0.31 per pound, or their coverage for lost peanuts defaulted to coverage at the non-quota price election price of $0.16 per pound(App. 68-70).

Applying law which governs contracts between private individuals generally, the district judge reasoned that if the FSA's assignment of a farm poundage quota was a condition of exchange which must be met before the Farmers could receive insurance coverage at the quota price election, the government's own agencies themselves had prevented or hindered this event from taking place and it was therefore excused as a contract condition within the meaning of *Restatement (First) of Contracts* § 295(App. 70-72). As the district judge observed, on May 3, 2002, the FSA instructed its county offices not to allocate the current year peanut quota to individual farms and pointed to the [2002 Farm Bill], *which had not yet been passed*, as the reason(App. 71).

The motion judge concluded:

> [t]he government not only was a promisor on the insurance contract and was bound by its terms, but also is responsible for the actions of the FSA, as the FSA, like the RMA [Risk Management Agency], is an agency of the United States Department of Agriculture. By passing the [2002 Farm Bill], which repealed 7 U.S.C. § 1358-1 and thus eliminated the FSA's duty to allocate the

> peanut quota to individual farms, the government "[p]revent[ed] or hinder[ed] the occurrence of a condition" [within § 295 of the Restatement (First) of Contracts]....
>
> The court believes that it was fundamentally wrong for the government to tell the Farmers that they would have insurance coverage at $0.31 per pound for as many peanuts as the FSA declared to be quota peanuts, and then, after the Farmers had planted their crops, to tell the FSA not to declare any quota peanuts. Under general contract law principles as expressed in the Restatement [First] of Contracts § 295, the court finds that the condition is excused, and that the government breached its contract by refusing to pay the Farmers' insurance claims at the rate of $0.31 per pound.

(App. 72). Furthermore, the court found that the terms of the contract "nowhere indicate that the peanut farmers were to bear the risk of regulatory change" by the government(App. 87).

Finally, Judge Howard determined from his reading of the 2002 Farm Bill that it was not an enactment of broad and general public purpose but rather one "obviously and specifically targeted [to] the the contractual obligations under the peanut farmers' pre-existing crop insurance policies for the 2002 crop year"(App. 77-78). As such, the government could not defend against the Farmers' enforcement of this insurance contract based upon the sovereign act or unmistakability doctrines as enunciated most recently by this Court in *United States v. Winstar Corp. et al.*,

518 U.S. 839 (1996) (App. 76-80).

In the wake of this ruling, farmers in other federal jurisdictions with similar claims asked the Multi-District Litigation Panel to transfer their cases to the district court for coordinated pretrial proceedings(App. 19). It did so and the district judge ultimately certified ten additional district-wide classes in the MDL cases for inclusion in this suit(App. 19-20;89-94). Damages were thereafter calculated using the amount of the lost amount of quota peanuts of each farm for the 2002 crop year multiplied by the difference between the 2002 rate for non-quota peanuts ($0.1775) and the $0.31 quota rate that had been announced by the government prior to the 2002 Farm Bill(App. 20). A final judgment entered in favor of all the Farmers in the aggregate amount of $30.1 million(App. 20;95).

The government appealed and the court of appeals reversed the lower court's entry of summary judgment in favor of the petitioners and remanded the matter to the district court for further proceedings(App. 1-40). The court determined from the language of the insurance contract itself and its method of insuring the peanut crop that before the government would be obligated to insure the Farmers' 2002 peanut crop at the $0.31 rate for quota peanuts, it had to assign poundage quotas for each of the individual farms for the 2002 crop year(App. 23-25;28). Since it had not done so, the Farmers were not entitled to indemnity based upon this $0.31 quota rate(App. 25;28). Nor could they demonstrate any injury resulting from the enactment of the 2002 Farm Bill which *increased* the market price for non-quota peanuts from $0.16 to $0.1775(App. 26-28).

In addition, the court of appeals could not hold the government responsible for its two announcements of December 14, 2001, and January 15, 2002, to the Farmers that the 2002 national poundage quotas for peanuts would remain the same as 2001 because these announcements were accompanied by warnings that pending legislation could change the national poundage quotas and that these values "*would* be either altered or rescinded"(App. 28)(emphasis supplied). As the court concluded,

> [a]lthough we have great sympathy for the hard-working peanut farmers of this country,....the [insurance policy] and the USDA's announcements neither expressly nor impliedly promised to indemnify the Farmers at the 31 cent rate quote, absent farm poundage quota allocations being made by the FSA for the 2002 crop year. The [insurance] policy thus did not, absent 2002 farm poundage quota allocations being made to individual farms, create a contractual obligation on the part of either the Government or the insurers to indemnify the Farmers for their 2002 peanut crop losses at the 31cent quota rate.

(App. 29).

Turning to the district judge's determination that the FSA's assignment of a farm poundage quota was excused as a condition of the Farmers receiving insurance coverage at the quota price election because the government had prevented or hindered it from taking place, the court found the lower court in error(App. 29-33). It concluded that the FSA's

assignment of a farm poundage quota was not a *condition* of the government's duty to indemnify the Farmers' peanut crop losses; instead the only condition to this duty was a covered loss by the Farmers and the farm poundage allocations "simply play a role in the *computation* of the indemnification to be paid to the Farmers for their covered losses"(App. 31-32)(emphasis in original). As the court put it, although not a "condition" of the government's performance under the contract, it was "an essential precursor to the Farmers being indemnified at the 31 cent quota rate"(App. 32).

Since there was no breach of contract by the government, the court of appeals found it unnecessary to address either the sovereign acts or unmistakability doctrines(App.33;40). Finally, it determined that the Farmers could not recover on a theory of promissory estoppel because there were no promises made by the government upon which they reasonably should have relied(App. 33-34). As it observed, the peanut quota program has a history of successive amendments of coverage by the government and its express "warnings of forthcoming alterations or revisions to the peanut quota program, received by the Farmers in late 2001 and early 2002, substantially undermine their reliance contentions"(App. 34-35).

On July 8, 2008, the court of appeals denied the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc*(App. 96-97).

REASONS FOR GRANTING THE PETITION

I. Allowing the Government To Go Back On Its Promise To Insure The Petitioners' Destroyed Peanut Crop At the Market Rate of $0.31 Per Quota Pound Subverts The Core Principles of *United States v. Winstar Corp. et al.*, 518 U.S. 839(1996), *Perry v. United States*, 294 U.S. 330(1935) and *Lynch v. United States*, 292 U.S. 571(1934), and Denies the Petitioners Due Process of Law.

In *Sinking Fund Cases*, 99 U.S. 700, 720-721(1879), this Court held that the government cannot deprive a party with which it contracts "of the fruits actually reduced to possession of contracts lawfully made....It cannot undo what has *already* been done, and it cannot unmake contracts that have *already* been made." *Id.* (emphasis supplied). In both *Lynch v. United States*, 292 U.S. 571(1934) and *Perry v. United States*, 294 U.S. 330 (1935), the Court expanded the principle of *Sinking Fund Cases* to hold that when contracting with private parties, the government must be bound by the same contract rules which bind those private parties.

Lynch involved life insurance policies issued to veterans by the government during World War I under the War Risk Insurance Act of 1917. When it discovered that these policies would eventually cost the government a billion dollars, Congress terminated them in the Economy Act of 1933 which provided that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed." 292 U.S. at 572-574.

A unanimous Court rejected the government's argument that these insurance policies should not be treated as insurance contracts. *Id.* at 576-577. As the *Lynch* Court stated through Justice Brandeis, even though designed to effect a benevolent purpose, these insurance policies were nonetheless "legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents." *Id.* at 576. He then declared that when the "United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals;"and its attempt to modify its own obligations after the policy issued was therefore a repudiation of the contract. *Id.* at 579-580.

In *Perry*, the Court reinforced these principles. The petitioner owned a $10,000 government bond issued in 1918 which, when redeemed, required the government to pay him $10,000.00 in "gold coin of the present standard of value." 294 U.S. at 346-347. A joint resolution of Congress in1933, however, declared such clauses to be "against public policy" and that such debts could be discharged with legal tender. *Id.* at 347;349. It further provided that "provisions for payment in gold 'contained in any law authorizing obligations to be issued by or under authority of the United States' were repealed." *Id.*

The *Perry* Court construed this language as exhibiting a clear intent by Congress in 1933 to abrogate impermissibly the government's 1918 pledge of payment in gold coin to bond purchasers. "To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the

pleasure and convenience of the pledgor[; but] this Court has given no sanction to such a conception of the obligations of our Government." *Id.* at 351. Relying on *Lynch,* the Court ruled that the government was bound by its promise to bondholders to pay in gold coin. *Id.* at 350-353.

Along side of this decisional law holding the government bound by its contracts, insurance and otherwise, are decisions which establish the collateral principle that when the government enters into contracts exercising one of its *sovereign powers*, e.g., the power to tax, to manage a federal social security system or to convey a navigational easement in a river bed, the government will be held liable for breach of contract only if its surrender of sovereign powers is expressed in unmistakable terms in the contract itself. *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 51-52(1986). *United States v. Cherokee Nation of Oklahoma,* 480 U.S. 700, 704;707(1987). *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982).

In *United States v. Winstar Corp. et al.*, 518 U.S. 839(1996), the Court addressed the intersection between this sovereign act or unmistakability doctrine and the *Lynch-Perry* line of cases holding that the government should be bound contractually in the same way private citizens are bound. In *Winstar*, the government in contracts with thrift institutions in the early and mid-1980's told them that they could rely upon supervisory goodwill and certain capital credits as assets when taking over failed banks in the aftermath of the savings and loans crisis. *Id.* at 847-855. When Congress enacted a law in 1989 changing the rules

about valuing these "assets" to their detriment, the thrifts sued the government for breach of contract. *Id.* at 856-857.

In rejecting the government's claim that the earlier contracts were sovereign acts which did not unmistakably limit its sovereign power thereby freeing it to pass later legislation to the thrifts' detriment, Justice Souter, writing for a plurality of the Court, reasoned that in most cases, in contracting with private parties, the government in order to be a reliable contracting partner and applying ordinary rules of contract construction, bears the risk that its subsequent legislative or regulatory acts may undermine and even prevent the performance of the contract, rendering it liable for breach of contract. *Id.* at 867-871. Moreover, there was nothing in the contractual arrangement between the government and the thrifts to cause this routine principle of contract interpretation and contract enforcement to be suspended. *Id.* at 880-885.

As Justice Souter wrote,

> [t]he contracts [here] have been read as solely risk-shifting agreements and [the thrifts] seek nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change....
>
> ....
>
> [I]t is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform.

Id. at 880-881;887.

Because the government's retroactive change in the valuation of bank assets to the thrifts' detriment was "tainted by a governmental object of self-relief," i.e., it was an attempt to shift the cost of meeting its legitimate public responsibilities to private parties, *cf. Armstrong v. United States*, 364 U.S. 40,49(1960), there was no good reason to give it the benefit of the defense of the impossibility of performance in order to avoid the obligations it voluntarily assumed. *Id.* at 896-897. In fact, the *Winstar* plurality ruled that to assert a successful impossibility defense, the government would have to show that the nonoccurrence of regulatory amendment was a basic assumption of these contracts. *Id.* at 905.

The premise of this requirement is that the parties will have bargained about these risks and if the risk was foreseeable, there should have been a a provision in the contract to this effect and the absence of such a provision gives rise to the inference that the risk of governmental regulation after formation of the contract *was assumed by the government. Id.* quoting *Lloyd v. Murphy*, 153 P.2d 47, 50(Cal. 1944)(Traynor, J.). While the *Winstar* plurality did not

> say that these conditions can never be satisfied when the Government contracts with participants in a regulated industry for particular regulatory treatment, ...it would be absurd to say that the nonoccurrence of a change in the regulatory...rules was a basic assumption upon which these contracts were made.

Id. at 906-907. Thus absent provisions in the contract to the contrary, the risk that regulatory or statutory

change would prevent or hinder performance rendering it liable for breach of contract stayed with the government and nullified any defense based upon impossibility. *Id.* at 908-909.

If the government wanted to reject the risk of having legislation enacted after formation of the contract which would render its performance impossible, it should have put this risk-shifting language in the contract. As the plurality noted in *Winstar*, "[i]t would, indeed, have been madness for the [the thrifts] to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would have been in jeopardy from the moment their agreements were signed." *Id.* at 910.

Three core principles therefore emerge from the *Winstar-Lynch-Perry* line of cases:

1. The government will be treated like any other private party when it enters into contracts, insurance and otherwise, not affecting its sovereign powers and the laws of contracts generally will define its rights;

2. In the absence of language to the contrary in the contract----and especially with heavily regulated industries----the risk that later regulatory or statutory change would occur during the life of the agreement affecting the central purposes of the contract *is assumed by and stays with the government* so that the contract remains enforceable despite this change in the law; and

3. When the government through Congress enacts legislation after the contract is formed

which impairs or renders impossible the government's performance, the government will be liable for breach of contract unless it is shown that the change in the law was unanticipated and contrary to the basic assumptions on which the parties agreed.

The decision below nullifies each of these core principles set out by this Court in the *Winstar-Lynch-Perry* line of cases and warrants the grant of this petition of certiorari by the Farmers.

The Contract To Insure.

In the first place, the court of appeals refused to apply basic contract law to construe the insurance policy including each of its deadlines for finalizing its critical terms, the actual conditions of exchange, the parties' conduct and the accumulated prior experience between them resulting in a reliable protocol about the terms of this contract and how it was to be performed. By ignoring this basic contract law—and then misstating the contract which was actually formed by the parties----the court denied the Farmers their contract rights under federal common law and denied them due process of law.

From 1996 through 2002, the Secretary of Agriculture established a national poundage quota by December 15th of the year preceding the crop year, as required by 7 U.S.C. § 1358-1(a)(3). The national poundage quota was apportioned to the states by the following January 15th and the FSA would thereafter assign farm poundage quotas to the individual farms. For each year between 1996 and 2002, the announced quotas for each farm remained about the same and

were identical for the crop years 1999-2002, leaving the Farmers eligible to insure their quota peanuts for approximately $0.31 per pound and non-quota peanuts for $0.16 per pound. In fact, 7 U.S.C. § 1358-1(b)(1)(B) provides that "the farm poundage quota for each marketing year for each farm...*shall* be the same as the farm poundage quota for the farm for the immediately preceding marketing year...."(emphasis supplied). On February 15, 2002, the government announced that the national quota would remain the same and "will be allocated to eligible quota and non-quota farms"(J.A.77).

By this time, the contract's change date had passed and the established price elections had been announced. Moreover, by May 3, 2002, when the FSA instructed its county offices not to follow the law and allocate the current year peanut quota to the individual farms, the contract's cancellation and termination dates had been passed, its sales closing date had been passed, the Farmers had already planted most of their crops and the coverage dates for the insurance policy had already begun. *This was a completed, enforceable contract by the time the government repudiated it on May 3, 2002, entitling the Farmers to indemnity for their crops at the rate $0.31 per pound for quota peanuts and $0.16 per pound for non-quota peanuts* and the court of appeals was wrong to rule otherwise.

The FSA was obligated by statute to allocate the farm poundage quota to each farm in order to allow for the indemnification process to finalize under the policy and the FSA would have done so had not the government on May 3, 2002, before the 2002 Farm Bill was enacted, directed the FSA not to do so. As a matter

of general contract law including the *Restatement of Contracts* which is part of the federal common law, *Franconia Assocs. v. United States*, 536 U.S. 129, 141-143(2002); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S.604, 608(2000); *Winstar*, 518 U.S. at 895, the government hindered its own performance of the promises it made to the Farmers under the insurance contract and it is liable to them for the breach of contract which it caused. *Restatement (First) of Contracts* § 295 ("If a promisor prevents or hinders the occurrence of a condition...and the condition would have occurred...except for such prevention or hindrance, the condition is excused"and the promisor is liable on the contract.) *Accord, Seaboard Lumber Co. United States*, 308 F.3d 1294, 1295(2nd Cir. 2002). *Powers v. Sims and Levin*, 542 F.2d 1216, 1225-1226(4th Cir. 1976). *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751, 776(2003).

Stated another way, when supervening governmental action prohibits or renders impossible the performance of its promise, the duty of the government to perform is discharged *unless the supervening event is the fault of the promisor government.* See *Restatement (Second) of Contracts* §§ 261, comment d; 264, comment a. In this respect, § 261, comment d of the *Restatement* provides that an obligor is discharged from performance where it is made impractical by the occurrence or nonoccurrence of an event which was a basic assumption of the contract, *unless the event is the fault of the obligor himself* in which case "this Section does not apply." This is especially true where, as *Winstar* makes clear, in heavily regulated industries like peanut farming, unless otherwise agreed, the risk that later regulatory or

statutory change would occur during the life of the agreement affecting the central purposes of the contract *is assumed by and stays with the government* so that the contract remains enforceable despite any changes in the law.

The court of appeals turned all this law in its head by making the Farmers instead of the government bear all the risk of a change in the law. It ignored the fact that the government itself had caused the FSA not to follow the law and allocate the current year peanut quota to the individual farms before the 2002 Farm Bill was even enacted; and it failed to hold it responsible on its promise to indemnify the Farmers at the bargained-for rate. It confusingly diminished the FSA's failure in this regard as merely "an *essential precursor* to the Farmers being indemnified at the 31 cent quota rate" when it was actually a "condition" of the government's performance, the nonoccurrence of which remained its responsibility under federal common law; and it refused to impose upon the government the burden of showing how its nonperformance squared with its duty of good faith and fair dealing under the *Restatement (Second) of Contracts* § 205.

By contrast, the district judge's analysis had it exactly right. The government's own agencies prevented or hindered the FSA's assignment of a farm poundage quota to individual farms and it was therefore excused as a contract condition within the meaning of *Restatement (First) of Contracts* § 295(App. 70-72). Nowhere in the insurance contract do its terms indicate that the Farmers would bear the risk of a change in the contract due to a regulation or statute after key deadlines had passed, promises had been

made, the contract price for quota and non-quota peanuts had been established and the crops had been planted. As the district judge rightly ruled, "it was fundamentally wrong for the government to tell the Farmers that they would have insurance coverage at $0.31 per pound for as many peanuts as the FSA declared to be quota peanuts, and then, after the Farmers had planted their crops, to tell the FSA not to declare any quota peanuts"(App. 72).

Promissory Estoppel.

In the second place, the court of appeals' analysis of the government's liability under a theory of promissory estoppel lacks any real-time appreciation of the formation of this crop insurance contract. With the knowledge gained by participating in the program in prior years, the Farmers relied on the fact that they had full insurance coverage in the event they suffered crop losses and they took steps beginning in the Fall of 2001----*before* the government announced in 2002 that there might be a new Farm Bill which "may' change the peanut quota program----to prepare for the 2002 crop year. They bought seed, planting material, and other goods in order to plant peanuts; they rented land to plant crops; they obtained credit based upon the price and guarantee provided by the policy; and they used the insurance contract itself as collateral on loans and for trading, purchasing or leasing equipment for use in the 2002 crop year. Reasonably relying upon their insurance coverage at $0.31 per quota pound of peanuts, they entered into contracts with third parties including leases, bank loans, credit, employment agreements, equipment purchases and other crop necessities.

All of these actions were reasonably undertaken by the Farmers *before* any announcement by the government about the possible effects of a new Farm Bill in the Spring of 2002. Yet the court of appeals resorted to these informal, precatory announcements as somehow alerting the Farmers that their *insurance coverage* for the destruction of their crops in the 2002 crop year would be changed. *None* of these government announcements communicated any fact about their insurance coverage; all they presaged was a *possible* change in the peanut quota program long after this contract for the 2002 crop year had not only been formed but also executed. Accordingly, it was wrong as a matter of law for the court to decide that any reliance by the Farmers on the efficacy of this program was not reasonable after these announcements were issued.

Winstar, Perry and Lynch all stand for the proposition that the government should be treated like a private party when it enters into contracts with other private parties; and that principle implies that the doctrine of promissory estoppel applies with full force to this transaction, making this insurance contract fully enforceable where serial acts and announcements by the government together with the passing of deadlines crucial to the contract's formation occurred, where the Farmers reasonably relied on the government's acts and representations and took actions like securing credit, loans, etc. and then planting crops based thereon. See *Heckler v. Community Health Services*, 467 U.S. 51, 59-63(1984). *Restatement (Second) of Contracts* § 90 (Promise Reasonably Inducing Action or Forbearance).

Due Process.

There can be no disagreement that the Farmers' rights under the contract are property rights deserving of protection under the due process clause of the fifth amendment to the federal constitution and that the government's unprincipled and illegal failure to insure their crops at the bargained-for rate of $0.31 for quota peanuts and $0.16 for non-quota peanuts for the 2002 crop year is a denial of due process. *Bowen, supra,* 477 U.S. at 52. *Lynch,* 292 U.S. at 579-580. See *Members of Peanut Quota Holders Ass'n v. U.S.,* 421 F.3d 1323, 1330-1335(Fed. Cir. 2005).

Finally, the court of appeals' unprincipled disposition undermines the sound policies which the crop insurance program was intended by Congress to foster, i.e., "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance ...." 7 U.S.C. § 1502(a); to regulate the production of peanuts in order to avoid severe fluctuations in price caused by rapid changes in market demand and the year-long lag in demand caused by crop-growing cycles; and to discourage reliance on *ad hoc* disaster relief while providing farmers a "primary source of risk management." See H.R. Rep. 96-430(1979). None of these policies is furthered by a decision which attenuates contract law in order to save the government the expense of owning up to its obligation under the crop insurance contract which the Farmers paid it to provide.

The words of the federal district court in *Wiley v. Glickman,* 1999 U.S. Dist. LEXIS 20278 at 51-53(D.N.D.1999), addressing an analogous situation with

wheat crop insurance, are apt:

> In short, Congress...has spent nearly twenty years struggling to create a reliable, uniform crop insurance program which obviate[s] the need for *ad hoc* assistance. By failing to adhere *to the procedural requirements established by* Congress, and reneging on provisions of crop insurance policies issued pursuant to Congress' authority, [the government] violate[s] the letter and purpose of [the crop insurance program], and thereby the intent of Congress, in the most fundamental of ways.

Id.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate that judgment and remand the matter to the United States United States District Court for the Eastern District of North Carolina at Greenville with instructions that it reinstate its decision granting the petitioners' summary judgment motion on their claim that the government had breached its contract with them to insure their peanut crop losses; reinstate the damage award based upon that ruling; and provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 07-1145, No. 07-1146
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: PEANUT CROP INSURANCE LITIGATION,
MDL-1634;

MARVIN TAYLOR BARNHILL; JOEY WATFORD; TOM CLEMENTS; FLORIDA PEANUT FARMERS, and others similarly situated; TERRY E. BEASLEY; WALLACE A. BERRY, South Carolina Peanut Farmer and others similarly situated; TEXAS PEANUT FARMERS, in the Southwest Growing Region; GEORGIA PEANUT FARMERS; CHARLES E. SMITH, JR.,
Plaintiffs-Appellees,
v.
ANN VENEMAN, Secretary of Agriculture for the United States of America; ROSS J. DAVIDSON, Administrator for Risk Management Agency; RISK MANAGEMENT AGENCY; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA; FEDERAL CROP INSURANCE CORPORATION; MIKE MOORE, RMA Regional Office Director Valdosta; RON BERRYHILL, RMA Regional Office Director, Oklahoma City, Oklahoma,
Defendants-Appellants.

In Re: PEANUT CROP INSURANCE LITIGATION,
MDL-1634;

MARVIN TAYLOR BARNHILL; JOEY WATFORD; TOM CLEMENTS; FLORIDA PEANUT FARMERS,

and others similarly situated; TERRY E. BEASLEY; WALLACE A. BERRY, South Carolina Peanut Farmer and others similarly situated; TEXAS PEANUT FARMERS, in the Southwest Growing Region; GEORGIA PEANUT FARMERS; CHARLES E. SMITH, JR.,
Plaintiffs-Appellants,

v.

ANN VENEMAN, Secretary of Agriculture for the United States of America; ROSS J. DAVIDSON, Administrator for Risk Management Agency; RISK MANAGEMENT AGENCY; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA; FEDERAL CROP INSURANCE CORPORATION; MIKE MOORE, RMA Regional Office Director Valdosta; RON BERRYHILL, RMA Regional Office Director, Oklahoma City, Oklahoma,
Defendants-Appellees.

December 5, 2007, Argued
May 8, 2008, Decided

Appeals from the United States District Court for the Eastern District of North Carolina, at Greenville. Malcolm J. Howard, Senior District Judge. (4:05-cv-00008-H; 4:02-cv-00159-H; 4:05-cv-00002-H; 4:04-cv-00191-H; 4:04-cv-00189-H; 4:04-cv-00188-H; 4:04-cv-00187-H; 4:04-cv-00186-H; 4:06-cv-00164-H; 4:06-cv-00163-H; 4:06-cv-00129-H).

JUDGES: Before WILKINSON and KING, Circuit Judges, and Henry F. FLOYD, United States District

Judge for the District of South Carolina, sitting by designation. Judge King wrote the opinion, in which Judge Wilkinson and Judge Floyd joined.

Vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Wilkinson andJudge Floyd joined.

COUNSEL: ARGUED: Jeffrey A. Clair, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants/Cross-Appellees. Robert Daniel Boyce, BOYCE & ISLEY, P.L.L.C., Raleigh, North Carolina, for Appellees/Cross-Appellants. ON BRIEF: Peter D. Keisler, Assistant Attorney General, George E. B. Holding, United States Attorney, Rudolf A. Renfer, Jr., Assistant United States Attorney, Eric Goulian, Assistant United States Attorney, Scott R. McIntosh, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants/Cross-Appellees. Gordon E. Boyce, BOYCE & ISLEY, P.L.L.C., Raleigh, North Carolina, for Appellees/Cross-Appellants.

OPINION

KING, Circuit Judge:

These appeals relate to lawsuits being pursued by several classes of peanut farmers (the "Farmers") who insured their 2002 peanut crops under a Multiple Peril Crop Insurance Policy (the "MPCI Policy") that, under federal law, was issued by private insurers and reinsured by the Government.[1] After suffering heavy losses to their 2002 peanut crops, due primarily to a severe drought during the growing season, the

Farmers filed claims under the MPCI Policy. They were indemnified for their losses at a "non-quota" rate of 17.75 cents per pound -- rather than at the claimed "quota" rate of 31 cents. The Farmers' expectations of indemnity at the 31 cent quota rate were premised largely on the Government's allocations of peanut poundage quotas in previous years. However, federal farm legislation enacted in May 2002 eliminated the peanut quota program that had been in effect in some form since 1941. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1301-1310, 116 Stat. 134, 166-83 (2002) (the "2002 Farm Bill").

After the Farmers were indemnified at the 17.75 cent non-quota rate for their 2002 crop losses, they initiated a series of civil actions against the Government in several federal jurisdictions, alleging, inter alia, that the MPCI Policy had been breached and that their due process rights had been violated.[2] The district court eventually had before it a district-wide class action on behalf of the Farmers situated in the Eastern District of North Carolina, as well as several other district-wide class actions first initiated in other jurisdictions and then transferred to the Eastern District of North Carolina by the Multi-District Litigation Panel (the "MDL Panel"). In disposing of the Farmers' contentions, the court, on July 22, 2004, certified a district-wide class action on behalf of the Farmers in the Eastern District of North Carolina (the "North Carolina case"). The court then awarded summary judgment to those Farmers on their breach of contract claims. *See Barnhill v. Davidson*, No. 4:02-cv-00159-H (E.D.N.C. July 22, 2004) (the "SJ Opinion").[3] On March 31, 2005, the court entered an order establishing a formula to be used in computing damage awards. *See In*

re Peanut Crop Insurance Litigation, No. 4:05-cv-00008-H (E.D.N.C. Mar. 31, 2005) (the "Damages Order").[4] On March 31, 2005, and again on December 20, 2006, the court extended its SJ Opinion (including the class certification ruling), as well as its Damages Order, to the lawsuits brought by the Farmers in other jurisdictions (the "MDL cases"). *See In re Peanut Crop Insurance Litigation*, No. 4:05-cv-00008-H (E.D.N.C. Mar. 31, 2005) ("MDL Order I"); *In re Peanut Crop Insurance Litigation*, No. 4:05-cv-00008-H2 (E.D.N.C. Dec. 20, 2006) ("MDL Order II").[5]

On December 20, 2006, the district court entered Final Judgment on the Farmers' breach of contract claims, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[6] The Government has appealed, contending, inter alia, that the court erred by (1) concluding that the MPCI Policy obligated the insurers to indemnify the Farmers at the 31 cent quota rate in the absence of 2002 peanut poundage quota allocations having been made to individual farms; and (2) determining that the Government's failure to allocate such quotas breached the MPCI Policy, based on the court's conclusion that the enactment of the 2002 Farm Bill hindered the performance of the Government's statutory duty to allocate such quotas. The Government also contends that the court erroneously premised its SJ Opinion, in part, on the Farmers' alternative theory of detrimental reliance. The Farmers have cross-appealed, asserting that the district court erred in failing to certify a nationwide class of farmer-plaintiffs, and also in denying the requests of certain plaintiffs for transfers of venue. As explained below, we disagree with the district court's breach of contract ruling, and thus vacate its SJ Opinion and remand.

I.

In order to properly assess these appeals, we first review the background of the federal crop insurance and peanut quota programs.[7] We then examine the relevant provisions of the MPCI Policy and the 2002 Farm Bill. Finally, we relate the procedural history of this litigation, as well as the appellate contentions of the parties.

A.

Although crop insurance under the MPCI Policy is provided by private insurers, it is reinsured by a governmental entity called the Federal Crop Insurance Corporation (the "FCIC"), pursuant to the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 et seq.[8] The FCIC is a wholly owned government corporation that operates under the umbrella of the Department of Agriculture (the "USDA"), and it is statutorily responsible for regulating the crop insurance industry. *See Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1372 (Fed. Cir. 2005). The FCIC is itself regulated by the USDA's Risk Management Agency (the "RMA"). *Id.* As specified by Congress, the FCIC's purpose is "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502(a). The crop insurance program implements the public policy of protecting farmers from the risks associated with drought, flood, and other natural disasters. 7 U.S.C. § 1508(b). The basic coverage provisions of crop insurance protect insured farmers against catastrophic risk, and serve to indemnify those farmers on losses in excess of 50% of the crop's normal yield, indemnified at 55% of

the crop's expected market price. 7 U.S.C. § 1508(b); 7 C.F.R. § 402.1. Pursuant to the governing provisions of the crop insurance program, insured farmers are also entitled to purchase additional insurance coverage at a greater percentage of their expected yields. 7 U.S.C. § 1508(c).

Prior to 2002, the extent to which the MPCI Policy indemnified lost or damaged peanut crops varied, depending on whether the insured crops were designated as "quota" or "non-quota" peanuts, as defined by the peanut quota program. This peanut quota program was recently addressed and described by the Federal Circuit in *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed. Cir. 2005) (concluding that 2002 Farm Bill's changes in quota program did not result in compensable taking under Fifth Amendment). That court's description of the background of the program is helpful, and was spelled out, in part, as follows:

> In the 1930s the United States' economic depression particularly affected the agricultural community. Congress, in an attempt to mitigate the effects of the depression on agricultural products, enacted the Agricultural Adjustment Act of 1938 ("AAA"), ch. 30 tit. III, § 301 *et seq.*, 52 Stat. 31, 38, which regulated the production and sale of tobacco and wheat within the United States. The statute instituted acreage allotments to prevent oversupply of the targeted agricultural commodities. In 1941, the AAA was amended to include farm acreage allotments for peanuts. The Agricultural Adjustment Act of 1938, *as amended*, ch. 39, tit. III, §§ 357-359, 55

> Stat. 88, 88-91 (the "1941 Act"). The 1941 Act sought to regulate the production of peanuts to avoid severe fluctuations in price caused by rapid changes in market demand and the yearlong lag in response to that demand caused by crop growing cycles. 1941 Act, 55 Stat. at 88. Since 1941, Congress has regulated peanut production primarily through quotas set by the Secretary of Agriculture . . . but the nature and reach of the quota system has not remained constant.

Peanut Quota Holders Ass'n, 421 F.3d at 1325-26. The peanut quota program was, prior to 2002, a price support system for each year's peanut crop. "Quota" peanuts were peanuts used for domestic edible consumption, whereas "non-quota" peanuts (a/k/a "additional peanuts" or "excess peanuts") were either crushed or exported. Non-quota peanuts had a lower value than quota peanuts, and, in the crop years preceding 2002, the vast majority of peanuts grown by the Farmers were quota peanuts.

The value of quota peanuts and the related national poundage quota for such peanuts in a specific crop year were determined by the USDA.[9] Farm poundage quota allocations to individual farms were made by the Farm Service Agency (the "FSA"), which administers the price support programs of the USDA. During the crop years immediately preceding 2002, quota peanuts lost due to covered occurrences were indemnified at the rate of 31 cents per pound, and non-quota peanuts lost due to such occurrences were indemnified at a 16 cent rate. The peanut quota program thus supplied the MPCI Policy with the value per pound of both quota and non-quota peanuts, and those values were used for

determining the applicable coverage and indemnification rates. Based on whether -- and to what extent -- farm poundage quotas were allocated to individual peanut farms, these rates were used to calculate the allowable indemnification for peanut crop losses under the Policy.

B.

1.

The coverage provisions of the MPCI Policy were published in the Federal Register and are codified in Title 7 of the Code of Federal Regulations. *See* 7 C.F.R. §§ 457.1 et seq. The USDA, acting through the RMA and the FCIC, is responsible for satisfying certain deadlines and for general oversight of the MPCI Policy. *See* 7 U.S.C. §§ 1501 et seq. The MPCI Policy also imposes certain obligations on insured farmers. The following MPCI Policy terms relate to dates and deadlines that are pertinent to these appeals:

- All changes to the MPCI Policy's coverage provisions, price elections, coverage limits, premium rates, and program dates must generally be made prior to a "contract change date." The Policy defines the "contract change date" as the "calendar date by which we make any policy changes available for inspection in the agent's office." MPCI Basic Policy ¶ 1. For the 2002 crop year, the contract change date was November 30, 2001.

- Price elections can be offered after the contract change date, so long as they are

offered no later than fifteen days prior to the "sales closing date," and are not less than those available on the contract change date. MPCI Basic Policy ¶¶ 3(e) & 4(b). The MPCI Policy defines the "sales closing date" as "a date contained in the Special Provisions by which an application must be filed. The latest date by which you may change your crop insurance coverage for a crop year." *Id.* ¶ 1.

- The sales closing date, which varied from state to state, was February 28, 2002, for the Farmers in the North Carolina case.[10]

- The "cancellation date," or the date on which coverage would automatically renew unless cancelled in writing, was also February 28, 2002, in North Carolina.[11] After the cancellation date, the Farmers were bound by the MPCI Policy and could neither rescind nor alter it.

- The "earliest planting date" for North Carolina Farmers was April 16, 2002. The MPCI Policy defines the "earliest planting date" as the "earliest date established for planting the insured crop." MPCI Basic Policy ¶ 1.

- The North Carolina Farmers had until the "final planting date" of May 31, 2002, to plant their peanut crops. The "final planting date" is the "date contained in the Special Provisions for the insured crop by which the

crop must initially be planted in order to be insured for the full production guarantee or amount of insurance per acre." MPCI Basic Policy ¶ 1.[12]

2.

The MPCI Policy includes several other provisions and definitions that are pertinent to an understanding of these proceedings, including:

- The MPCI Policy defines "price election" as the "amounts contained in the Special Provisions or an addendum thereto, to be used for computing the value per pound . . . for the purposes of determining premium and indemnity under the policy." MPCI Basic Policy ¶ 1. The price election is generally based on the FCIC's projection of market prices for a given commodity. 7 U.S.C. § 1508 (c)(5) & (6).

- The MPCI Policy required each insured Farmer to file an annual "acreage report" detailing the peanut crop acreage to be planted by the farm and the "effective poundage marketing quota, if any, that is applicable" to an individual farm for the current crop year. MPCI Policy Peanut Provision ¶ 6.

- The term "effective poundage marketing quota" is important with respect to this litigation and federal crop insurance, and is defined by the MPCI Policy as the "number

> of pounds reported on the acreage report as eligible for the average support price per pound . . . not to exceed the Marketing Quota established by [the FSA] for the farm serial number." MPCI Policy Peanut Provision ¶ 1.

- The MPCI Policy defines "quota peanuts" as "[p]eanuts that are eligible to be valued at the average support price per pound." MPCI Policy Peanut Provision ¶ 1. "Non-quota peanuts," in turn, are simply defined as "[p]eanuts other than quota peanuts." *Id.*

- The "production guarantee" is defined in the MPCI Policy as the "number of pounds . . . determined by multiplying the approved yield per acre by the coverage level percentage you elect." MPCI Basic Policy ¶ 1.

The MPCI Policy provides that "[t]he maximum pounds that may be insured at the quota price election" are the lesser of "the effective poundage marketing quota," or the "insured acreage multiplied by the production guarantee" -- but, to the extent that the resulting figure "exceeds the effective poundage marketing quota, the difference will be insured at the non-quota peanut price election." MPCI Policy Peanut Provision ¶ 3(b). Although the MPCI Policy explains how quota peanuts are insured, it also authorizes and provides for coverage where lost or damaged crops do not involve quota peanuts. For example, the MPCI Policy makes reference to the "effective poundage marketing quota, *if any*." *Id.* ¶ 6. In calculating the maximum poundage that may be insured as quota peanuts, the MPCI Policy looks to the lesser of the effective poundage marketing

quota, on the one hand, or the insured acreage multiplied by the production guarantee, on the other. If, with respect to an insured farm, the insured acreage multiplied by the production guarantee exceeds the effective poundage marketing quota, the difference is insured and indemnified at the non quota rate only. If an insured farm has not been allocated an effective poundage marketing quota, its entire insured acreage, multiplied by the production guarantee, would exceed a quota allocation of zero and the entire production would be insured at the non-quota rate. Thus, when an annual farm poundage quota allocation for an insured farm is "zero," none of that farm's peanut production is insured at the quota rate.

The MPCI Policy similarly provides for the calculation of indemnity in the event that part or all of a Farmer's lost crops are non-quota peanuts. Specifically, the indemnity formula provides that the value of lost or damaged peanuts is computed by first multiplying the insured acreage by the production guarantee per acre. MPCI Policy Peanut Provision ¶ 14(c). The second step of this indemnity formula requires the effective poundage marketing quota of the farm to be subtracted from the resulting sum, to determine the amount of insured quota and non-quota peanuts (the amount in excess of the effective poundage marketing quota is the amount of non-quota peanuts). *Id.* After determining the amount of insured quota and non-quota peanuts, those amounts are multiplied by their respective price elections. Thus, in the event a farm poundage quota allocation is not made to a farm with an insured crop, the MPCI Policy provides that the loss to be indemnified must be determined on the basis of the price election for non-quota peanuts. *Id.*

C.

On November 30, 2001 (the contract change date), an addendum to the MPCI Policy was issued and made effective. The addendum provided that losses suffered by 2002 crop year peanuts would be indemnified at 31 cents per pound for quota peanuts and 16 cents per pound for non-quota peanuts (as they had been indemnified for the previous several years). Two weeks later, on December 14, 2001, the USDA announced a national poundage quota for peanuts for the 2002 crop year, at the same level as the 2001 national poundage quota. The USDA announcement stated that the "2002-crop national poundage quota will be allocated to each state based on the state's share of the 2001-crop national poundage quota." J.A. 75. This announcement, however, also alerted the Farmers to the possibility that the peanut quota program for the 2002 crop year could be altered or eliminated by statute. Specifically, it advised that:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as law, the 2002 poundage quota and price support announced by this release may be altered or rescinded.*

J.A. 75 (emphasis added). As noted, this USDA announcement was made two weeks after the contract change date of November 30, 2001. On January 15, 2002, the USDA announced that the national poundage quota for peanuts would remain the same in 2002 and "will be

allocated to eligible quota and non-quota farms." J.A. 77. This announcement again warned, however, that:

> The Farm Bill currently being considered by Congress would change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded.*

J.A. 78 (emphasis added). As these USDA announcements forecast and warned, the FSA did not allocate farm poundage quotas to individual farms in 2002. Instead, on May 3, 2002, the FSA directed its county offices not to allocate any such quotas to individual peanut farms for 2002. Ten days later, on May 13, 2002, the President signed into law the 2002 Farm Bill, which, inter alia, repealed the FSA's statutory authority to allocate farm poundage quotas to peanut farms and substantially and materially altered the federal crop assistance program for peanut farmers.

In the place and stead of the peanut quota system, the 2002 Farm Bill provided for several programs: continued price supports through non-recourse loans at rates substantially below the quota rates; a program of direct payments to farmers; a new price support program of payments triggered by the rise and fall of market prices; a marketing quota buy-out program; and a mandated increase -- from 16 cents to 17.75 cents per pound -- in the price election for non-quota peanuts, to be used to compute premiums and indemnity payments under the 2002 MPCI Policy. 2002 Farm Bill § 1310(c).[13]

On May 28, 2002, in response to the major statutory revisions made by the 2002 Farm Bill to the peanut quota program, the USDA sent a bulletin to the crop insurance companies, advising them that all 2002 peanuts were to be treated as non-quota peanuts for purposes of the MPCI Policy in the 2002 crop year. Accordingly, all indemnities made pursuant to the MPCI Policy for 2002 peanut crops were made at the non-quota rate of 17.75 cents.[14]

D.

Unfortunately, the Farmers' 2002 peanut crops suffered heavy losses and damages, primarily due to a severe drought during the growing season. When they filed their claims for indemnification under the MPCI Policy, the Farmers were informed that their losses would only be indemnified at the non-quota rate of 17.75 cents per pound, although they had been expecting indemnification at the 31 cent quota rate. Indeed, quota peanuts had usually constituted a majority of the Farmers' annual crops. When their claims for indemnification at the 31 cent rate were denied, the Farmers initiated this series of lawsuits, alleging that the MPCI Policy had been breached and that the Government had violated their due process rights.

1.

The North Carolina case was filed on November 19, 2002, "on behalf of all peanut farmers in North Carolina and Virginia who are eligible for the Multiple Peril Crop Insurance Policy for crop year 2002 and are similarly situated to the named Plaintiffs." J.A. 11. Put

succinctly, the complaint sought declaratory, injunctive, and compensatory relief, and requested that the proceeding be certified as a class action. It alleged that the Government had breached the MPCI Policy by the unilateral and untimely modification of its coverage terms, and asserted that the Government had violated the Farmers' due process rights by, inter alia, arbitrarily and capriciously altering the Policy by unilateral and retroactive action.

In ruling on the class certification issue in its SJ Opinion, the district court certified a class of insured Farmers whose farms were situated within the Eastern District of North Carolina and who had been assigned farm poundage quotas for the 2001 crop year. *See* SJ Opinion 11-23. The court concluded, however, pursuant to § 1508(j) of Title 7, that it lacked jurisdiction over insured Farmers whose farms were situated outside the Eastern District of North Carolina, and thus excluded them from the certified class. *Id.* at 12, 19.[15]

The district court then proceeded to address the parties' cross-motions for summary judgment, and ruled in favor of the Farmers on the merits of their breach of contract claims. *See* SJ Opinion 32-46. In so ruling, the court concluded that the Government had breached its contractual obligation under the MPCI Policy to indemnify the Farmers' 2002 lost peanut crops at the 31 cent quota rate. The court reasoned that the Government, by the 2002 Farm Bill's repeal of the FSA's authority to allocate farm poundage quotas, had hindered the occurrence of a condition that would have given rise to coverage and indemnity at the 31 cent rate, and that the Government was thus barred from denying liability under the MPCI Policy. *Id.* at 35-38.

The court also determined that neither the "sovereign acts doctrine" nor the "unmistakability doctrine" afforded the Government a valid defense to liability. *Id.* at 39-47.

With respect to the "sovereign acts doctrine," the court recognized that the Government would possess a valid defense to the Farmers' breach of contract claims if a "public and general" law prevented the occurrence of a condition giving rise to liability. SJ Opinion 39-42. It concluded, however, that the 2002 Farm Bill, in repealing the poundage marketing quota program, included a provision that "obviously and specifically targeted the contractual obligations under the peanut farmers' preexisting crop insurance policies for the 2002 crop year." *Id.* at 44. The court concluded that "the reduction of insurance coverage was direct, not merely incidental to the accomplishment of a broader governmental objective." *Id.* (internal quotation marks omitted). It thus determined that the sovereign acts doctrine did not authorize the Government to escape liability for the Farmers' breach of contract claims. *Id.* at 46.

The court next concluded that, "because the [2002 Farm Bill] was not 'public and general,' the unmistakability doctrine does not apply." SJ Opinion 46. With respect to the due process claims, the court determined that the "plaintiffs' due process arguments are primarily based on their contract claims." *Id.* at 47-48. Concluding that it had "already discussed the plaintiffs' contract claim at length and found for the plaintiffs as to this claim," the court found it unnecessary to resolve the plaintiffs' due process claims. *Id.*[16]

2.

When the district court made its rulings in the SJ Opinion, several similar lawsuits were being pursued in other federal courts. One such proceeding, filed in the Court of Federal Claims on behalf of Farmers in Texas, Georgia, Alabama, Florida, and South Carolina, was dismissed on December 16, 2003, for lack of jurisdiction. On appeal, the Federal Circuit concurred in the jurisdictional ruling, but vacated the dismissal and remanded to the Court of Federal Claims for transfers of the lawsuits to the appropriate district courts. *Tex. Peanut Farmers Ass'n v. United States*, 409 F.3d 1370 (Fed. Cir. 2005). The Farmers in those cases then requested the MDL Panel to transfer their claims to the Eastern District of North Carolina, pursuant to 28 U.S.C. § 1407. The MDL Panel agreed, and transferred these and other cases to the district court "for coordinated or consolidated pretrial proceedings." J.A. 292 (citing 28 U.S.C. § 1407).[17]

On March 31, 2005, and December 20, 2006, the district court certified several additional district-wide classes in the MDL cases.[18] The class certification orders entered with respect to the MDL cases tracked the court's class certification ruling in the SJ Opinion in the North Carolina case -- certifying district-wide classes of Farmers whose insured peanut crops were located within the district in which their cases had originally been pending. *See* MDL Order I at 3; MDL Order II at 5. The court also ruled that its SJ Opinion, rendering the Government liable on the Farmers' breach of contract claims, extended to each of the certified classes of Farmers in the MDL cases. *See* MDL Order I at 2; MDL Order II at 4.

On March 31, 2005, after receiving recommendations from the Farmers and the Government, the district court entered its Damages Order, explaining the formula it would apply to the calculation of the Farmers' damages. The formula first provided for the calculation of the Farmers' hypothetical 2002 farm poundage quota and non-quota amounts. This initial calculation was a necessary starting point because there had been no 2002 farm poundage quota allocations made to individual peanut farms. The Damages Order called for these hypothetical farm poundage quota and non-quota amounts to be determined by multiplying each individual Farmer's 2002 production guarantee by the district-specific percentage of quota liability for 2001 to arrive at a quota amount. *See* Damages Order 2. The amount of lost "quota" production for each Farmer was then multiplied by the difference between the 2002 rate for non-quota peanuts (17.75 cents) and the 31 cent quota rate that had been announced prior to the 2002 Farm Bill. *Id.* at 2-3.[19] After calculating the damage awards under this formula, the court, on December 20, 2006, entered Final Judgment for the Farmers in the aggregate sum of approximately $ 30.1 million.

3.

The district court's Final Judgment made its rulings appealable under Rule 54(b) of the Federal Rules of Civil Procedure, ordering as follows:

> [P]ursuant to Rule 54(b), . . . more than one claim for relief has been presented and multiple parties are involved, the Court hereby enters Final Judgment in favor of all plaintiffs and class members who presently have cases pending

> before this Court as to the breach of contract claim. The Court further finds that there is no just reason for delay.

The court thus determined that its judgment was final with respect to the breach of contract claims, and also found that there was no just reason for delay. The Government filed its notice of appeal on February 16, 2007, and the Farmers have cross-appealed. We possess jurisdiction pursuant to 28 U.S.C. § 1291. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 428-29, 76 S. Ct. 895, 100 L. Ed. 1297 (1956).

II.

We review de novo a district court's award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the nonmoving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). An award of summary judgment is appropriate only "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). We also review de novo a district court's assessment of an insurance policy, in that issues of contract interpretation constitute questions of law. *See Hendricks v. Central Reserve Life Ins. Co.*, 39 F.3d 507, 512 (4th Cir. 1994).

III.

The Government's contention that the district court erred in awarding summary judgment to the Farmers on their breach of contract claims is premised on two basic propositions: (1) that the court erred by concluding that the MPCI Policy obligated the insurers to indemnify the Farmers at the 31 cent quota rate in the absence of 2002 farm poundage quota allocations having been made to individual farms; and (2) that the court incorrectly determined that the Government's failure to allocate such 2002 farm poundage quotas breached the MPCI Policy, based on its conclusion that the enactment of the 2002 Farm Bill hindered the performance of the Government's statutory duty to allocate such quotas. The Government also maintains that the court erroneously premised its SJ Opinion, in part, on the Farmers' alternative theory of detrimental reliance. As explained below, we agree with the Government that the district court erred in awarding summary judgment to the Farmers on their breach of contract claims.

A.

Before turning to the Government's contentions of error, we must first ascertain the body of law that applies to our analysis of these contract issues. As an initial proposition, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States v. Winstar Corp.*, 518 U.S. 839, 895, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) (internal quotation marks omitted). And, as the Federal Circuit recently observed, "[i]t is customary, where Congress has not adopted a different standard, to apply to the construction of government

contracts the principles of general contract law, which become federal common law." *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007) (internal quotation marks omitted). The Federal Circuit further concluded that "[t]he Restatement of Contracts reflects many of the contract principles of federal common law." *Id.; see also Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 608, 120 S. Ct. 2423, 147 L. Ed. 2d 528 (2000) (relying on Restatement of Contracts for principles of repudiation and restitution); *Franconia Assocs. v. United States*, 536 U.S. 129, 141-43, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (2002) (applying principles of general contract law by relying in part on Restatement (Second) of Contracts). Both the district court and the parties in this litigation, through their reliance on the Restatement of Contracts and other general principles of contract law, have impliedly agreed that the contract principles of federal common law should govern this dispute. Because neither the Government nor the Farmers contend that Congress promulgated or mandated a different standard, we will apply such principles in our assessment of the breach of contract issues. *Cf. Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002) (concluding that "the law is well settled that federal common law *alone* governs the interpretation of insurance policies issued pursuant to the [National Flood Insurance Program]"). We now turn to the Government's contentions of error on the district court's breach of contract rulings.

B.

First, we agree with the Government that the MPCI Policy did not create any contractual obligation for the

insurers to indemnify the Farmers for lost peanuts in 2002 at the 31 cent quota rate. Instead, the indemnity obligation at the quota rate was contingent on 2002 farm poundage quota allocations being made to individual peanut farms. Absent such 2002 allocations, there was no obligation under the MPCI Policy for the Farmers to be indemnified at the 31 cent quota rate. Put simply, to be indemnified at the 31 cent rate, an insured farm had to be assigned a 2002 farm poundage quota by the FSA. Because the FSA did not assign farm poundage quotas for the 2002 crop season, the Farmers were never insured at the 31 cent quota rate, and their claims were properly indemnified at the 17.75 cent non-quota rate. *See Studio Frames, Ltd. v. Std. Fire Ins. Co.*, 483 F.3d 239, 245 (4th Cir. 2007) (applying federal common law to interpretation of federal insurance policy and determining that "if the policy language in issue is clear and unambiguous, we apply it directly").

This interpretation is supported by the express terms of the MPCI Policy, which required each Farmer to file an "acreage report," detailing the farm's peanut acreage and the "effective poundage marketing quota, *if any*, that is applicable" to the farm for the current crop year. MPCI Policy Peanut Provision ¶ 6 (emphasis added). The MPCI Policy provides that "the effective poundage marketing quota, *if any*, for each unit" is not to exceed the farm poundage quota allotment -- a provision that specifically contemplates the contingency of no quota allocations being made to an insured farm. *Id.* ¶¶ 1, 6 (emphasis added). As the Government asserts, the MPCI Policy was applicable to all insured peanut farms, including those that had not previously been allocated any farm poundage quotas. Thus, the MPCI Policy

makes no promise to provide coverage and indemnification at the 31 cent quota rate in the absence of the FSA's allocation of 2002 poundage quotas to individual farms

This point is further supported by the fact that, absent the 2002 farm poundage quota allocations, it would be impossible to insure the Farmers at the 31 cent quota rate. This is so because the MPCI Policy provides that "[t]he maximum pounds that may be insured at the quota price election" may not exceed "the effective poundage marketing quota" -- defined in turn as a quantity of peanuts "not to exceed the Marketing Quota established by FSA for the farm serial number." MPCI Policy Peanut Provision ¶¶ 1, 3. As a result, if the FSA farm poundage quota for an insured farm is "zero," none of that farm's peanut crop is insured at the 31 cent quota rate.

The MPCI Policy's indemnity formula also supports the interpretation that, absent 2002 farm poundage quota allocations, the insurers have no obligation to indemnify the Farmers at the 31 cent quota rate. As noted above, the Policy's indemnity formula provides that the value of insured peanuts must first be computed by determining an insured farm's amounts of quota and non-quota peanuts (by subtracting the effective poundage marketing quota from the production guarantee), and then multiplying these amounts by their respective price elections. Thus, the MPCI Policy does not, absent the allocation of 2002 farm poundage quotas, authorize indemnification at the 31 cent quota rate. *See* MPCI Policy Peanut Provision ¶ 14. This point is illustrated by the fact that the district court was unable to calculate the Farmers' damages at the 31 cent

quota rate without resorting to an extrinsic source, i.e., 2001 poundage qucta amounts, in the formula provided by its Damages Order. *See* Damages Order 2-3.

The Farmers, on the other hand, maintain that the Government's announcements, as well as the MPCI Policy, contain both express and implied promises that the Farmers would be indemnified at the 31 cent quota rate for what should have been their lost 2002 farm poundage quota peanuts, and that enactment of the 2002 Farm Bill and the Government's handling of their indemnity claims breached those promises. In particular, the Farmers point to the MPCI Policy provision that coverage will not be reduced:

> In addition to the price election or amount of insurance available on the contract change date, we may provide an additional price election or amount of insurance no later than 15 days prior to the sales closing date . . . . These additional price elections . . . will not be less than those available on the contract change date.

MPCI Basic Policy P 3(e); *see also id.* P 4 (providing that any changes in policy provisions, including price elections, will be provided no later than the contract change date, except that price elections may be offered after that time in accordance with paragraph 3). As noted above, the 2002 Farm Bill specifically altered the price election (although expressly for *non-quota peanuts* only), by providing that

> the non-quota price election . . . shall be 17.75 cents per pound and shall be used for all aspects

> of the policy relating to the calculations of premium, liability and indemnities.

2002 Farm Bill § 1310(c)(2). Put succinctly, under the 2002 Farm Bill, all peanuts were "non-quota peanuts." The Farmers, however, contend that the alteration to the price election for non-quota peanuts made by the 2002 Farm Bill was in fact a change to the price election for quota peanuts -- reducing overall coverage and directly contravening the MPCI Policy Peanut Provisions. *See* MPCI Policy Peanut Provision ¶ 3 (providing that "additional price elections . . . will not be less than those available on the contract change date"). Because the price election of 17.75 cents, as specified in the 2002 Farm Bill, actually *raises* the price election for non-quota peanuts, we disagree with the Farmers on this point. This aspect of the 2002 Farm Bill thus does not constitute a breach of the MPCI Policy.

The Farmers nevertheless contend that section 1310(c) of the 2002 Farm Bill not only altered the price election, it did so after the date specified for such alterations in the MPCI Policy. Even if the terms of the MPCI Policy were somehow violated when the 2002 Farm Bill raised the price election for non-quota peanuts after the Policy's deadlines, we would decline to award relief on that basis. Put simply, the Farmers cannot demonstrate that the increase made by the 2002 Farm Bill to their indemnity for non-quota peanuts (to 17.75 cents), even if made after the change date specified in the Policy, resulted in an injury to them. *See, e.g., Santana, Inc. v. Levi Strauss & Co.*, 674 F.2d 269, 275 (4th Cir. 1982) (concluding that, in order to maintain action for breach of contract, plaintiff must show that alleged breach

caused injury, and finding no injury occurred when alleged breach benefited plaintiff).

The Farmers' primary contention, of course, is not that the 2002 Farm Bill raised the indemnity rate for non-quota peanuts, but that the Government was able to avoid indemnifying them at the 31 cent quota by enactment of the 2002 Farm Bill. Although the MPCI Policy provides that "additional" price elections may be offered after the contract change date, the Farmers' contention that the 2002 Farm Bill *replaced* the price elections available under the MPCI Policy (rather than offering additional ones) is unpersuasive. In the absence of farm poundage quotas being allotted to individual farms, the Farmers were unable to avail themselves of the 31 cent quota rate, regardless of whether the 2002 Farm Bill replaced that rate or simply provided price elections in addition to it.

We are similarly unpersuaded by the Farmers' contention that the two USDA announcements of December 14, 2001, and January 15, 2002, made express or implied warranties to them with respect to the 2002 farm poundage quotas for peanuts. Although the USDA announcements indicated that the 2002 national poundage quotas would remain the same as in the previous year, and that such quotas would be allocated to eligible farms in the future, the announcements explicitly warned the Farmers that Congress was considering a Farm Bill that would change the peanut price support program by eliminating poundage quotas. Importantly, these announcements specified that, if the 2002 Farm Bill was enacted, the national poundage quotas for peanuts would be either altered or rescinded.

In these circumstances, we agree with the Government's contentions, and reject those of the Farmers'. Although we have great sympathy for the hardworking peanut farmers of this country, our obligation is to rule on the basis of the factual underpinnings and the applicable legal principles. The MPCI Policy and the USDA's announcements neither expressly nor impliedly promised to indemnify the Farmers at the 31 cent quota rate, absent farm poundage quota allocations being made by the FSA for the 2002 crop year. The MPCI Policy thus did not, absent 2002 farm poundage quota allocations being made to individual farms, create a contractual obligation on the part of either the Government or the insurers to indemnify the Farmers for their 2002 peanut crop losses at the 31 cent quota rate. *See Studio Frames, Ltd. v. Std. Fire Ins. Co.*, 483 F.3d 239, 245 (4th Cir. 2007) (applying federal common law to interpretation of federal insurance policy and determining that "if the policy language in issue is clear and unambiguous, we apply it directly").

C.

Our analysis of the Farmers' breach of contract claims does not end here, however. The district court, in part, premised its finding of a breach on the legal principle that, in the proper circumstances, a contract condition (here, the allocation of 2002 farm poundage quotas) may be excused if the promisor prevents or hinders the occurrence of the condition and it would have otherwise occurred. Accordingly, although the court appears to have concluded that, under the terms of the MPCI Policy, the Government was not obligated to indemnify the Farmers at the 31 cent quota rate, the court

nevertheless found a breach by the Government, concluding that it had prevented the FSA from allocating farm poundage quotas to individual farms for the 2002 crop year. In its ruling, the court relied for this conclusion on section 295 of the Restatement (First) of Contracts, which provides:

> If a promisor prevents or hinders the occurrence of a condition, . . . and the condition would have occurred . . . except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless . . . (a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party.

SJ Opinion 35-36 (citing Restatement (First) of Contracts § 295 (1932) as quoted in *Powers v. Sims & Levin*, 542 F.2d 1216, 1226 (4th Cir. 1976) (Winter, J., concurring and dissenting)). Based on this Restatement provision, the court concluded that such a hindrance had occurred when the 2002 Farm Bill, enacted on May 13, 2002, eliminated the statutory directive to the FSA to allocate farm poundage quotas to individual farms for each crop year. *Id.* at 36-38 (citing 7 U.S.C. § 1358-1(b)(1)(A) (2001)). The court further concluded that, as "the FSA would have assigned the farm poundage quotas had the [2002 Farm Bill] not prevented or hindered it from doing so, the [requirements] of § 295 [are] met." *Id.* at 35-36.

Although Judge Parker recognized years ago, in *Fuller Co. v. Brown*, that "[i]t is a principle of fundamental

justice that if a promisor is himself the cause of the failure of performance . . . of a condition upon which his own liability depends, he cannot take advantage of the failure," *see* 15 F.2d 672, 678 (4th Cir. 1926) (quoting 2 *Williston on Contracts* § 677), that legal principle is inapplicable to this appeal. The indemnification of the Farmers under the MPCI Policy did not "depend" on FSA's allocation of 2002 farm poundage quotas. The district court thus erred in excusing what it viewed as the "condition" of 2002 farm poundage allocations. A "condition," as defined by the Restatement (Second) of Contracts, is "an event, not certain to occur, which *must* occur, unless its nonoccurrence is excused, *before* performance under a contract becomes due." Restatement (Second) of Contracts § 224 (emphasis added); *see also* 13 *Williston on Contracts* § 38:7 (4th ed. 2006) ("A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises."); *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000) ("The prevention doctrine is a generally recognized principle of contract law according to which if a promisor prevents or hinders fulfillment of a *condition to his performance*, the condition may be waived or excused." (emphasis added)).[20]

The only condition to the indemnification of the Farmers under the MPCI Policy was the occurrence of a natural cause of covered loss. *See* MPCI Policy Peanut Provision P 11 (providing coverage for loss caused by, inter alia, adverse weather conditions, fire, insects, plant disease, wildlife). When a covered loss occurs, the obligation of the insurer to indemnify under the MPCI Policy is triggered. There is, however, no Policy

provision that conditions such indemnification on whether farm poundage quotas are allocated to an individual farm for a particular crop year. Instead, the farm poundage quota allocations simply play a role in the *computation* of the indemnification to be paid to the Farmers for their covered losses. Thus, the Government is also correct on this point -- performance under the MPCI Policy is not conditioned on the allocation of farm poundage quotas by the FSA.

Importantly, our conclusion on this contention is supported by the fact that the Farmers have already been indemnified for their 2002 crop losses under the MPCI Policy -- although they were indemnified at the non-quota rate of 17.75 cents, rather than at the 31 cent quota rate they seek in this litigation. Thus, the Government did not hinder the occurrence of any condition that had to occur before an indemnification obligation under the MPCI Policy was triggered. Indemnification was due when the Farmers presented their claims for covered losses under the MPCI Policy, and the insurers performed under the Policy by indemnifying those losses at the non-quota rate of 17.75 cents.

Because the allocation of the 2002 crop year farm poundage quotas was not a "condition" of performance under the MPCI Policy, we disagree with the SJ Opinion on this issue. Although the 2002 farm poundage quota allocations were an essential precursor to the Farmers being indemnified at the 31 cent quota rate, they were not a condition to the insurers' performance under the coverage and indemnification provisions of the MPCI Policy. As a result, the district court erred in concluding in its SJ Opinion that a breach of the MPCI

Policy occurred, and in awarding summary judgment to the Farmers on their breach of contract claims. We must therefore vacate the court's ruling in this regard.[21]

D.

Finally, the Government disagrees with the Farmers' alternative contention that they are entitled to indemnification for their crop losses at the 31 cent rate because they had expended substantial sums of money and resources in reliance on the MPCI Policy and on the USDA announcements (which had forecast allocations of poundage quotas in 2002 at the same rates and percentages as in earlier years). Such reliance by the Farmers included, inter alia, planting their peanut crops, entering into leases and bank loans, foregoing other farming options, and cancelling other insurance coverage. Because the peanut quota program was not repealed by the 2002 Farm Bill until after the announcement of the national poundage quota for the 2002 crop year -- when the MPCI Policy was already final and after the beginning of the 2002 planting season -- the Farmers contend that they are entitled to recover their damages. The elements of such a detrimental reliance claim are: (1) a promise, (2) which the promisor should reasonably expect to cause action by the promisee, (3) which does cause such action, and (4) which should be enforced to prevent injustice to the promisee. *C & K Petrol. Prods., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988) (citing Restatement (Second) of Contracts § 90).

The Government asserts, on the other hand, that the Farmers' unilateral expectation that farm poundage quota authority would remain in effect for the 2002 crop

year does not afford them any basis for imputing to the MPCI Policy an implied promise to indemnify at the 31 cent quota rate. *See Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F.3d 1431, 1444 (11th Cir. 1996) (looking to Restatement (Second) of Contracts § 90 and concluding that "[i]t is axiomatic that a plaintiff cannot recover for reasonable, detrimental reliance on a promise without proving that the defendant made the promise"). Furthermore, the Government contends that the Farmers could not reasonably rely on the fact that poundage quota allocations were made in previous years, because earlier amendments to farm support programs clearly indicated that the peanut quota program was subject to congressional modification.

Modifications to government programs by congressional action are not at all out of the ordinary, and had indeed occurred recently in the context of the peanut quota program. For example, in 1996, Congress barred the allocation of such quotas to farms controlled by public entities or non-producers residing out of state. *See* Federal Agriculture Improvement and Reform Act, Pub. L. No. 104-127, § 155(i)(1)(A)(v), 110 Stat. 888, 927 (1996) (adding 7 U.S.C. § 1358-1(b)(1)(D)). Similarly, Congress eliminated statutory provisions establishing specific minimums on the national poundage quota, an amendment that substantially reduced the peanut quota allocations to individual farms. *Id.* § 155(i)(2) (amending 7 U.S.C. § 1358-1(a)(1)). Accordingly, as the Government asserts, there has been a "'persistent congressional refinement of the peanut quota program.'" Br. of Appellants 29 (quoting *Members of the Peanut Quota Holders Assoc. v. United States*, 60 Fed. Cl. 524, 530 (Ct. Fed. Cl. 2004)).

Finally, the USDA's warnings of forthcoming alterations or revisions to the peanut quota program, received by the Farmers in late 2001 and early 2002, substantially undermine their reliance contentions. As detailed above, the events immediately preceding the 2002 crop year made clear to the Farmers that congressional action on the peanut quota program was likely to occur. For example, in its December 14, 2001 announcement of the national poundage quota for peanuts, the USDA warned:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as law, the 2002 poundage quota and price support announced by this release may be altered or rescinded.*

J.A. 75 (emphasis added). Similarly, in its January 15, 2002 announcement, the USDA again warned that "[t]he Farm Bill currently being considered by Congress would change the peanut program . . . . *If pending legislation is enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded.*" J.A. 78 (emphasis added). Significantly, legislation repealing the peanut quota program had passed the House of Representatives in October 2001, well before the MPCI Policy for the 2002 crop year became final. *See* 147 Cong. Rec. H6407 (Oct. 5, 2001).

In these circumstances, the Farmers were on ample notice in late 2001 and early 2002 of the possibility --

indeed, the likelihood -- of major changes (i.e., alteration or rescission) being made to the peanut quota program. Although the timing of the 2002 Farm Bill was unfortunate for the Farmers, their assertions of reliance on the 2002 farm poundage quota allocations being made to individual peanut farms are misplaced, particularly when viewed in the context of the specific announcements of the USDA.[22]

IV.

Pursuant to the foregoing, we vacate the district court's award of summary judgment to the Farmers and remand for such further proceedings as may be appropriate.

VACATED AND REMANDED

Footnotes

[1]A copy of the MPCI Policy is found at J.A. 40-59. (Citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this appeal.)
[2]The Farmers initiated their lawsuits against multiple defendants, including the Secretary of Agriculture, the Administrator of the Risk Management Agency, the Department of Agriculture, the United States, the Federal Crop Insurance Corporation, and others. We refer to the defendants collectively as the "Government."
[3]The SJ Opinion can be found at J.A. 237-85.
[4]The Damages Order can be found at J.A. 295-302.
[5]The MDL Order I can be found at J.A. 303-07, and the MDL Order II can be found at J.A. 362-67.
[6]The Final Judgment can be found at J.A. 368.

[7]Although various terms have been used in the record, sometimes interchangeably, we refer to the components of the peanut price support program as follows. First, we refer to the general price support program at issue as the "peanut quota program." We use the term "national poundage quota" to describe the total peanut poundage quota set by the United States Department of Agriculture for the entire country, and we refer to the peanut quota allocations made to individual farms as the "farm poundage quota."

[8]Section 1508(j) of Title 7 provides that, if a "claim for indemnity is denied by the [FCIC] or an approved provider, an action on the claim may be brought against the [FCIC] or Secretary [of Agriculture] only in the United States district court for the district in which the insured farm is located." 7 U.S.C. § 1508(j)(2). The various public officials and entities named as defendants in this litigation are apparently proper parties thereto, pursuant to the MPCI Policy and § 1508(j) -- and the parties have made no contention to the contrary.

[9]Because the peanut quota program was repealed by the 2002 Farm Bill, we refer to it in the past tense.

[10]The sales closing dates for the MPCI Policy in the various districts outside North Carolina were in or about February 2002. For example, the sales closing date in Virginia was March 15, 2002.

[11]The cancellation dates provided by the MPCI Policy were as follows: January 15, 2002, for certain counties in Texas; February 28, 2002, for certain other counties in Texas and all states not otherwise mentioned; and, March 15, 2002, for New Mexico, Oklahoma, Virginia, and the remaining Texas counties.

[12]Farmers outside North Carolina were also required to plant their peanut crops in the Spring of 2002. For

example, Virginia Farmers had an initial planting date of April 11, 2002, and a final planting date of June 10, 2002.

[13]Section 1310(c) of the Farm Bill provides, in pertinent part, that:

> (c) Treatment of crop insurance policies for 2002 crop year –
>
> (1) Applicability -- This subsection shall apply for the 2002 crop year only notwithstanding any other provision of law or crop insurance policy.
>
> (2) Price Election -- the non-quota price election . . . shall be 17.75 cents per pound and shall be used for all aspects of the policy relating to the calculations of premium, liability and indemnities.

[14]Thus, while the Farmers were bound to the MPCI Policy on February 28, 2002, and were obligated to plant their peanut crops between April 16 and May 31, 2002, the 2002 Farm Bill repealed the peanut quota program on May 13, 2002. This enactment occurred subsequent to the date when the Farmers were entitled to withdraw from the MPCI Policy or able to reevaluate the planting of their 2002 peanut crops -- although the Farmers had twice been placed on notice by the USDA (on December 14, 2001, and, again on January 15, 2002) of likely changes to the peanut quota program.

[15]As noted above, § 1508(j) of Title 7, as relied upon in the SJ Opinion, provides that if a "claim for indemnity is denied by the [FCIC] or an approved provider, an action on the claim may be brought against the [FCIC] or Secretary [of Agriculture] only in the United States district court for the district in which the insured farm is located." *See supra* note 8.

[16]The district court also appears to have based its SJ Opinion, at least in part, on a theory of detrimental reliance. In its breach of contract analysis, the court concluded that "it was fundamentally wrong for the government to tell the farmers that they would have insurance coverage at $0.31 per pound for as many peanuts as the FSA declared to be quota peanuts, and then, after the farmers had planted their crops, to tell the FSA *not* to declare any quota peanuts." SJ Opinion 38.

[17]On October 26, 2004, the MDL Panel first transferred six MDL cases to the Eastern District of North Carolina for coordinated or consolidated pretrial proceedings. Thereafter, on June 21, 2006, the Panel transferred several additional MDL cases to the Eastern District of North Carolina. These lawsuits were consolidated in the Eastern District of North Carolina pursuant to 28 U.S.C. § 1407, which authorizes the judicial panel on multi-district litigation to transfer civil actions involving one or more common questions of fact to a single district for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

[18]The ten additional district-wide classes certified by the district court in the MDL cases include Farmers in the Middle District of Alabama, the Northern District of Florida, the Southern and Middle Districts of Georgia, the District of South Carolina, the Northern, Southern, Eastern, and Western Districts of Texas, and the Eastern District of Virginia.

[19]Although the court authorized reductions in this formula to account for unpaid premiums, it rejected the Government's contention that the damage awards should be further reduced by disaster relief payments the Farmers received to compensate for their 2002 peanut crop losses. The court also declined to deduct

benefits received by the Farmers from the commodity assistance program that the 2002 Farm Bill authorized to replace the peanut quota program.

[20]In addition to not being a "condition" to its performance under the MPCI Policy, the Farmers failed to demonstrate that the Government made an enforceable promise to allocate poundage quotas to individual peanut farms. As the Restatement (Second) of Contracts provides, "[n]on-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur." Restatement (Second) of Contracts § 225.

[21]The Government also argues that the district court erred in its application of the unmistakability and sovereign acts doctrines. These doctrines create exceptions from government liability when a breach is caused by an act of the government. Because, as explained herein, the Government is not liable for any breach of the MPCI Policy, we need not assess assertions in this regard.

[22]In light of our disposition of these appeals, we need not reach the Government's assertions of error concerning the Damages Order. To the extent the Farmers seek to pursue the class and venue contentions they have raised on cross-appeal, the district court may revisit these issues in light of this opinion.

Filed 7/22/2004
4:02-cv-00159-H(4).
United States District Court
for the Eastern District of North Carolina,
at Greenville.

MARVIN TAYLOR BARNHILL et al
Plaintiffs
v.
ROSS J. DAVIDSON, Administrator; RISK MANAGEMENT AGENCY, et al.
Defendants

ORDER

This matter is before the court on the plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23, filed June 18, 2003, and on the parties' cross-motions for summary judgment, filed June 6, 2003, and January 2, 2004. The court conducted a full hearing in this matter on May 20, 2004, at which the parties addressed all pending issues and motions. Thus, this matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiffs in this action are 461 peanut farmers from Virginia, North Carolina, and South Carolina,[1] who applied for and obtained Multiple Peril Crop Insurance ("MPCI"), pursuant to the Federal Crop Insurance Act, 7 U.S.C. § 1508(h), for their peanut crops for the 2002 crop year.[2] Defendants administer the federal crop insurance program and include the Risk Management Agency (RMA); Ross Davidson, the Administrator for the RMA; the United States

Department of Agriculture (USDA); Ann Veneman, the Secretary of Agriculture for the United States; and, the United States.[3]

Plaintiffs expected to receive federal crop insurance coverage at the quota price election level of $0.31 per pound of peanuts grown for 2002. However, on May 13, 2002, Congress passed the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 ("the Farm Security Act"), which eliminated the quota system for peanuts.[4] As a result, all insurance claims for peanut crop losses were paid at the non-quota price election rate of $0.1775 per pound. Plaintiffs claim that defendants breached the insurance contract by reducing the coverage payments from $0.31 to $0.1775 per pound of peanuts.

Plaintiffs' complaint, filed on November 19, 2002, includes six claims: a breach of contract claim, three claims for denial of due process, and two claims for violation of various statutes requiring notice of policy changes. Plaintiffs currently seek class certification and request summary judgment on the breach of contract and due process claims.

On January 2, 2004, defendants filed a motion to dismiss, or alternatively for summary judgment. Because defendants' motion references documents outside the pleadings, the court will consider it as a motion for summary judgment. Defendants' motion for summary judgment requests the court to dismiss the plaintiffs' claims for lack of standing and for failure to exhaust administrative remedies.

STATEMENT OF THE FACTS

The parties agree on the following facts.[5] The peanut quota system had been in place, in various versions, since 1938, when Congress enacted the Agricultural Adjustment Act of 1938 ("the 1938 Act"), currently codified at 7 U.S.C. § 1281 (2000). The 1938 Act "terminated the free market production and sale of agricultural commodities within the United States, including peanuts." See Members of the Peanut Quota Holders Ass'n v. United States, 60 Fed. C1. 524, 525 (2004) (discussing history of peanut quota regulation). It provided assistance to farmers through direct payments and restrictions on competition. Id. The peanut quotas were initially based solely on acreage, but the Food and Agriculture Act of 1977, Pub. L. No. 95-113, §§ 801--807, 91 Stat. 913, instituted quotas based on the weight of peanuts produced. Id. These poundage quotas applied to domestic edible peanuts, but not those grown for export or for crushing into oil. Id. In 1981 Congress terminated acreage quotas, leaving only poundage quotas. Id. (citing the Agriculture and Food Act of 1981, Pub. L. No. 9798, §§ 701-707, 95 Stat. 1213, 1248).

In 1996, Congress passed the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 155(1) (2), 110 Stat. 888, 928 ("the 1996 Act"). This Act ended direct payments to peanut farmers but gave them price supports in the form of marketing loans. The 1996 Act set the loan rate for quota peanuts at $610 per ton (approximately $0.31 per pound) for the years 1996 through 2002. In contrast, the loan rate originally set for nonquota peanuts for the 2002 crop year was only $132 per ton ($0.16 per pound).

On May 13, 2002, congress passed the Farm

Security Act. The Farm Security Act took the drastic step of eliminating the quota system for peanuts, so that "anyone could now grow and market unlimited quantities of peanuts without penalty or restriction." Members of the 'Peanut Quota Holders Ass'n v. United States, 60 Fed. Cl. at 525. The Farm Security Act included a "buyout" for quota holders under which quota holders would receive a total of $0.55 per pound. This buyout did not affect the crop insurance agreements. The federal peanut program is managed by the Farm Service Agency (FSA), an agency of the USDA.

The federal crop insurance program also began in 1938, with the passage of the Federal Crop Insurance Act of 1938. See H. R. Rep. No. 103-649, reprinted in 1994 U.S.S.C.A.N. 2516, 2518. "From its origin, the stated purpose of the federal crop insurance program has been 'to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance.'" Wiley v. Glickman, No. CIV A3-99-32, 1999 WL 33283312, at *1 (D.N.D. Sept. 3, 1999) (discussing history of federal crop insurance program) (quoting 7 U.S.C. § 1502(a)). The crop insurance program was amended in 1980 and again in 1994 to increase farmers' participation in the program and to make federal crop insurance "the farmers" primary source of risk management." Id. (citing 1994 U.S.S.C.A.N. at 2517, 2519).

The federal MPCI policies are contracts of insurance between private insurers and eligible farms. The Federal Crop Insurance Corporation ("FCIC"), an agency of the USDA, reinsures these contracts through separate contracts between the insurers and the FCIC,

The Risk Management Agency is also an independent agency of the USDA and is responsible for overseeing the FCIC and administering the MPCI program.

For the 2002 crop year, plaintiffs obtained MPCI policies on their peanut crops. The MPCI policies consisted of the basic provisions, the peanut provisions, the special provisions and actuarial documents, the applicable regulations in 7 CFR chapter IV and the accepted insurance application. (MPCI policy, basic provisions § 1.) The amount of MPCI coverage available to peanut farmers was tied to the federal peanut program as it then existed. Under the MPCI policy provisions, any changes to the policy provisions, price elections, amounts of insurance, premium rates, and program dates must be made prior to the contract change date. (Id. § 4 (b).) For the 2002 crop year, the contract change date was November 30, 2001. (MPCI policy, peanut provisions § 4.) on November 30, 2001, an addendum to the insurance policies provided that the price election would be $0.31 per pound for quota peanuts and $0.16 per pound for non-quota peanuts. (MPCI policy, special provisions.)

The MPCI policies also contained other key dates. The cancellation and termination date and the sales closing date for North Carolina policies was February 28, 2002. (Peanut provisions § 5; N.C. Special Provisions.) After this date, the farmers were bound by the insurance contract and were not allowed to rescind or change the contract. (Basic provisions § 1.) The initial planting date for North Carolina farmers was April 16, 2002.[6] (N. C. Special Provisions.) Farmers in North Carolina could plant their peanut crops only between this date and the final planting date, May 31,

2002. (Basic provisions § 1.)

The method for settling crop loss claims was set forth in the peanut crop provision, § 14. Under that method, the amount of insured non-quota peanuts is equal to the insured acreage multiplied by the production guarantee per acre, minus the insured effective poundage marketing quota. (Peanut provisions § 14(c)(1)-(2)). For settling the claim, the effective poundage marketing quota is the lesser of:

> 1) The amount of the effective poundage marketing quota reported on the acreage report;
> 2) The amount of the FSA effective poundage marketing quota; or
> 3) The amount determined at the final settlement of your claim.

(Id. § 14(b)). Similarly, the peanut provisions define the term " [e] ffective poundage marketing quota" as "[t]he number of pounds reported on the acreage report as eligible for the average support price per pound..., not to exceed the Marketing Quota established by FSA for the farm serial number." (Id. § 1.)

Each year between 1996 and 2002, the Secretary of Agriculture would establish a national poundage quota by December 15 of the year preceding the marketing year, pursuant to former 7 U.S.C. 1358-1. See 7 U.S.C. § 1358-1(a) (2) (2001) (requiring Secretary to announce national peanut poundage quota for a marketing year not later than December 15 preceding the marketing year) . The national poundage quota would later be apportioned to the states, and the FSA would then assign farm poundage quotas to individual

farms. See 7 U.S.C. § 1358-1 (a) (3) (2001) (stating that the national poundage quota shall be apportioned among the states); 7 U.S.C. 1358-1 (b) (2001) (providing for allocation of farm poundage quotas to individual farms). On December 14, 2001, the USDA announced a national poundage quota for peanuts for the 2002 crop year. (Admin. Record at Vol. 2 p. 3.) The 2002 quota was at the same level as the 2001 quota. When the USDA allocated the national poundage quota to the states on January 15, 2002, it stated that "[t]he 2002 national poundage quota ... will be allocated to eligible quota and nonquota farms according to 1-PN, paragraph 140." (FSA Notice PN-649, Record at Vol. 2 p. 5.)

However, the FSA never allocated the 2002 national poundage quota to individual farms. In fact, on May 3, 2002, the FSA directed the county of f ices not to allocate the current year peanut quota, and it informed them that the software that the offices would soon receive would be disabled from allocating the quotas to individual farms. (FSA Notice PN--652, Record at Vol. 2 p. 8; see also RMA Bulletin MGR-01-016, Record at Vol. 1 p. 28.)

The December 14, 2001, announcement alerted the farmers to the possibility that the quota system might be eliminated. Specifically, it stated that

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. If pending legislation is enacted as Law for 2002,

> the 2002 poundage quota announced according to this notice will be altered or rescinded.

(Record at Vol. 2 p. 3.) The notice allocating the quota to the states also contained a warning that the new Farm Bill, if passed, might eliminate the quota system for peanuts. (FSA Notice PN-649, Record at Vol. 2 p. 5.)

Congress passed the Farm Security Act on May 13, 2002, eliminating the quota system of price supports for peanuts in the middle of the 2002 crop year, after peanuts had been planted and after the last date farmers could cancel or change their crop insurance. The Farm Security Act raised the price election for non-quota peanuts from $0.16 to $0.1775 per pound and effectively eliminated the $0.31 per pound price election for quota peanuts. Because the Farm Security Act eliminated all quota peanuts, the USDA sent a bulletin to the insurance companies stating that all peanuts were to be treated as non-quota peanuts. (RMA Bulletin MGR-02-006.1, Record at Vol. 1 p. 25.) At least some farmers then received an insurance declaration from their insurance company, which stated that "the price election for your peanut crop has been corrected to $0.1775/MPCI.... We apologize for any confusion." (Ex. 9-C to Pls.' Mot. for Partial Summ. J.)

The year 2002 was a disastrous year for the peanut crops. Plaintiffs characterize it as "the worst drought in thirty to forty years." (Pls.' Mot. for Summ. J. at p. 12.) According to the North Carolina Department of Agriculture and Consumer Services, drought reduced peanut production in North Carolina by 41 percent from the 2001 levels. N.C. Dept. Of Agr.

& Consumer Servs., N.C. Agriculture overview -- Field Crops, available at http://www.ncagr.com/stats/general/crop-fld.htm.

The peanut farmers now argue that the insurance contracts had provided coverage for their peanut crops at the price election level of $0.31 per pound for quota peanuts. They argue that the defendants changed the terms of the contract after the contract change date and after the farmers had planted their crops in reliance on this historical program. The farmers have now received loss payments at the election rate of $0.1775 per pound, and they are currently suing for the difference of about $0.13 per pound, which they contend was reasonable to rely upon.

COURT'S DISCUSSION

I. Class Certification

A district court passing on a motion for class certification is accorded broad discretion in deciding whether to certify a class. In re American Med. Sys. Inc., 75 F.3d 1069, 1079 (6th Cir. 1996). However, the court must exercise this discretion within the strictures of Rule 23, which outlines the requirements a plaintiff must meet in order to bring a representative action. See id.; Lienhart v. Dryvit Systems, Inc., 255 F. 3d 138, 146 (4th Cir. 2001). The four threshold requirements for class certification are (1) numerosity, (2) commonality, (3) typicality, and (4) representativeness. Fed. R. Civ. P. 23 (a). In addition to these requirements, a plaintiff seeking certification must also satisfy one of the three concepts embodied in Rule 23(b).

Plaintiffs have proposed the following definition of the class:

> Peanut farmers in North Carolina and in eligible counties in Virginia and South Carolina who contracted during the period from November 30, 2001 through March 15, 2002 for the 2002 Multiple Peril Crop Insurance policy for peanuts, the terms and conditions of which were published in the Federal Register. The class includes peanut farmers who had automatically applied by virtue of having a contract in 2001 (the Multiple Peril Crop Insurance policy) with continuous coverage who did not cancel the insurance contract. The class does not include farmers who had initially applied for Peanut Multiple Peril Crop Insurance Policy coverage, but who had withdrawn that application before March 15, 2002, nor does it include farmers who never applied for Peanut Multiple Peril Crop Insurance coverage.

(Pls.' Mot. for Class Certification at p. 2.)

Defendants object to certification of the class as defined by plaintiffs on the grounds that it is overly broad and that it fails to meet the requirements of Rule 23 (a) and (b). Defendants have several specific objections. First, they object to the inclusion in class of peanut farmers from outside the Eastern District of North Carolina.[7] They point to 7 U.S. C. § 1508 (j) (2) (a), which states that "an action on the [crop insurance] claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located."

Defendants also note that the provisions of the MPCI policy provide that any legal action must be brought in accordance with the provisions of 7 U.S.C.§ 1508 (j). (Basic provisions § 25.) Because this court has no jurisdiction over peanut farmers whose farms are located outside the Eastern District of North Carolina, the court agrees that the plaintiff class should be limited to those farmers whose farms are located in this district.

Defendants also object that the class definition improperly includes peanut farmers who "(i) never had insurance coverage on peanuts for various reasons (e.g. never planted or did not file acreage reports) ; (ii) did not have any loss in the 2002 crop year; or, (iii) had claims for losses which were denied for reasons wholly unrelated to the loss of peanut quota*" Plaintiffs do not take issue with the defendants' objections, but instead respond that the court can tailor the definition of the class to meet the objections raised by the defendant. Indeed, the plaintiffs seem to acknowledge that even though 1,848 peanut producers contracted for crop insurance as of the sales closing date, only the 735 producers who have been paid claims at the rate of $0.1775 would be eligible to recover under this suit. Thus, the court must further limit the class to those peanut producers who actually recovered $0.1775 under the insurance policy for their losses.

Defendants also argue that the plaintiffs' class definition is overly broad in that it does not limit the class of peanut farmers to those who operated farms to which a quota was assigned in previous years by the Farm Service Agency. Defendants contend that only those farmers who had "lost" their quotas due to the

2002 Farm Bill were impacted by the elimination of the quota.

Plaintiffs do not address this argument, but they imply elsewhere in their briefs that because the price election level for growing peanuts was below the cost to the farmers for growing peanuts, many if not all of the farmers only grew peanuts that they believed would be quota peanuts. (Pls.' Reply at p. 11.) Under the 2001 version of 7 U.S.C. § 1358-1 (b) (1) (B), the quota for each farm would be "the same as the farm poundage quota for the farm for the immediately preceding marketing year," subject to adjustments that could increase or decrease the quota amount. Because the peanut quotas for each year were based on the quota assigned the previous year, only those peanut farmers who had been assigned a quota in 2001 had an expectation of receiving a quota for the 2002 crop year and "lost" the quota for 2002. Accordingly, the court concludes that the class should include only those farmers who had been assigned a quota for the 2001 crop year.

As limited by the court, the new definition of the class is as follows:

> Peanut farmers whose farms are located in the Eastern District of North Carolina, who had insurance coverage on peanuts under the 2002 Peanut Multiple Peril Crop Policies, who had losses for the 2002 crop year, who settled those losses for $0.1775 per pound, and who had been assigned farm poundage quotas for the 2001 crop year.

The court will now turn to the requirements of Federal Rule of Civil Procedure 23(a) and 23(b).

A. Numerosity

Numerosity requires that a class be so large that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Seven hundred and thirty-five North Carolina peanut farmers have settled their insurance claims at the rate of $0.1775 per pound. Potentially all of these farmers would be included in the plaintiff class.[8] Currently, 274 North Carolina farmers have joined in this lawsuit; therefore, the plaintiff class would include about 461 additional eastern North Carolina farmers. Plaintiffs argue that they have met the numerosity requirement under Rule 23(a)(1), and defendants concede this point. The court believes that judicial economy is best served by handling these matters as a class action, and finds that the numerosity threshold is satisfied.

B. Commonality

Commonality requires that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23 (a) (2) ; see Stott v. Hawsworth, 916 F. 2d 134, 145(4th Cir. 1990). Plaintiffs argue that the commonality requirements are met because all the insurance contracts had the exact same terms and were subject to the same rates, rules, and regulations provided by the FCIC or the RMA. Plaintiffs note that the changes in the peanut quota system affected all farmers in the exact same manner and that the defendants' defenses are the same for all class members.

Defendants note that the requirements of commonality and typicality tend to merge with adequacy of representation. Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 337 (4th Cir. 1998). Defendants argue that the class, as originally defined by plaintiffs, includes many peanut producers who would not be entitled to recover at all, including those who never had or perfected a loss claim, who had never grown quota peanuts, and who had not filed the required acreage report. However, as the court has defined the class more narrowly, most of defendants concerns disappear.[9]

Defendants argue that even when the class is more narrowly defined, some commonality issues would remain. Specifically, defendants argue that because no quotas were ultimately assigned to individual farms for the 2002 crop year due to the 2002 Farm Bill, plaintiffs' damages can be determined only by first making an individualized determination as to what quota might have been assigned to each farm. Defendants point out that under the applicable regulations, former 7 C.F.R. § 729. 210, enacted in 1996 under the 1996 Act, the quota assigned to an individual farm could change from year to year.

Plaintiffs agree that there are certain variables among the plaintiffs -- the level of insurance coverage (e.g. 70% or 85%), the actual production histories, and the number of acres -- that are necessary to calculate damages for individual plaintiffs. Plaintiffs contend that class treatment is nevertheless warranted because class issues predominate. Plaintiffs assert that the issue of damages could be handled as a matter of administration and would impose no burden on the court.

The court believes that this case is an ideal prospect for class action litigation, as the basic facts of this case are the same for each plaintiff. Each plaintiff had the exact same crop insurance contract, each plaintiff had previously been assigned a quota by the FSA in 2001, each plaintiff expected to have coverage at the price election level of $0.31 per pound for their peanut crop, and each plaintiff received only $0.1775 per pound in insurance proceeds for the 2002 crop year because Congress eliminated the quota system for peanuts. The determination of damages for each plaintiff is a mathematical determination that can be easily calculated based on each farmer's percentage of coverage and the like. Because these facts are the same for each plaintiff, each plaintiff has the same claims for breach of contract and violation of due process.

Furthermore, class certification in this case is proper even though the individual amounts of damage will differ. "Individual questions of damages are typical in class actions, and they are rarely a barrier to certification." DeLoach v. Philip Morris Cos., Inc., 206 F.R.D. 551, 566 (M.D.N.C. 2002). Accordingly, the court finds that this case involves questions of law and fact common to all plaintiffs.

C. Typicality

Typicality requires that the claims of the named class representatives be typical of those of other members of the class. In short, a named class member who satisfies the typicality requirement "must be part of the class and possess the same interest and suffer the same injury as the class members." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982).

In the plaintiffs' proposed order for class certification, plaintiffs suggest that the class representatives should consist of only the original fourteen plaintiffs named in the complaint. [10] As some of these plaintiffs are Virginia farmers, not all of the proposed representatives would be part of the class, which is restricted to farmers with farms located in the Eastern District of North Carolina.

The first four of these plaintiffs -- Barnhill, Hamill, Branham, and Jenkins - farm and reside in the Eastern District of North Carolina. Of the next four plaintiffs, Clements resides in Virginia and has farms in Virginia and North Carolina, and Grant, Phelps, and Flythe reside in North Carolina and have farms in Virginia and North Carolina. The remaining farmers reside and farm only in Virginia.[11]

As the court has already indicated, the court has no subject matter jurisdiction over plaintiffs from other North Carolina districts, Virginia districts, and the District of South Carolina. 7 U.S.C. § 1508(j). The court therefore will dismiss all plaintiffs, including the proposed class representatives, who do not have farms in the Eastern District of North Carolina. These farmers and others similarly situated must address these issues within their own district. The farmers who have farms in both the Eastern District of North Carolina and Virginia will not be dismissed, but may only recover as to their farms in North Carolina.

The remaining eight proposed class representatives are peanut farmers who farm in the Eastern District of North Carolina and who had

perfected insurance contracts on their crops for the 2002 growing season. The FSA had assigned a farm poundage quota to these proposed representatives for crop years prior to 2002. The proposed representatives all sustained losses on their crops from the unusually poor weather during the summer of 2002. Their peanut crop losses were covered by their crop insurance, and their claims were settled at the non-quota price election amount of $0.1775 per pound.

The elimination of the peanut quota system affected the rights of the proposed class representatives in the same manner as the rest of the plaintiff class. These proposed representative plaintiffs suffered the same injury as the rest of the class. The court therefore finds that the claims of the remaining proposed class representatives are typical of the class, and will appoint those eight farmers as class representatives.

D. Representativeness

Representativeness requires that the named class members "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The class representatives have the same claims and are subject to the same defenses as the entire plaintiff class. The representative plaintiffs do not appear to have any interests antagonistic to the class interests. The court finds that the representatives will fairly and adequately protect the interests of the class from the Eastern District of North Carolina.

The court finds that plaintiffs' current counsel, Philip R. Isley, G. Eugene Boyce, and R. Daniel Boyce, will adequately represent the plaintiff class within the

Eastern District of North Carolina. Counsel is currently representing peanut farmers in similar cases in other federal district courts, and counsel has had previous experience in class action litigation.

This court therefore concludes that the class, as defined by the court, satisfies the requirements of numerosity, commonality, typicality, and representativeness under Rule 23(a).

E. Rule 23(b)

For a plaintiff class to be certified, the class must satisfy all the requirements of 23(a), and one of the one of the following subsections of Rule 23 (b)

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. ...

Plaintiffs argue that classification is appropriate under Rule 23 (b) (2) because defendants' actions are generally applicable to the class and because plaintiffs seek injunctive relief and/or recovery of insurance proceeds at $4.31 per pound. In the complaint, plaintiffs request a declaratory judgment that the defendants breached the insurance contract and violated plaintiffs' due process and statutory rights. Plaintiffs also seek an injunction compelling the defendants to honor the contract. Alternatively, plaintiffs seek recovery of money damages.

Class certification under Rule 23 (b) (2) is appropriate only when "the relief sought is exclusively or predominantly injunctive or declaratory. "Lukenas v. Bryce' s Mount. Resort, Inc . ,538 F.2d 594, 595 (4th Cir. 1976). Defendants argue that although the requested relief is couched in terms of declaratory and injunctive relief, plaintiffs essentially seek monetary damages. The court agrees and finds that the appropriate final relief is predominantly monetary."[Aln action seeking a declaration that certain conduct constitutes a breach of conduct would not qualify under Rule 23 (b) (2) because the effect simply is to lay the basis for a damage award rather than injunctive relief." Wright & Miller, Fed. Prac. & Proc. § 1775. Accordingly, the court finds that the plaintiff class may not be certified pursuant to 23(b)(2).

Plaintiffs alternatively argue that the court may certify the class pursuant to 23(b)(1) or 23(b)(3). [W]here certification is appropriate under both Rule 23 (b) (1) and Rule 23 (b) (3), the Court must certify the class under the former so that any resulting judgment will have res judicata effect as to the entire class." Peoples v. Wendover Funding Inc., 179 F.R.D. 492, 500 (D. Md. 1998) (citing In re A.H. Robins Co. Inc., 880 F.2d 709, 728 (4th Cir. 1989)).

Wright and Miller have indicated that certification under Rule 23(b)(17(B) is appropriate for cases involving breach of contract. Wright & Miller, Fed. Prac. & Proc., § 1774. In this case, individual class members would present the same facts and claims and would be subject to the same defenses. Furthermore, although the court believes that any monetary relief would predominate the requested declaratory relief, any declaratory or injunctive relief would affect the entire class. See id. (stating that "[a]lthough suits in which injunctive or declaratory relief is sought most frequently are brought under Rule 23(b) (2), Rule 23(b) (l) (B) also may be applicable since an individual action seeking relief of that type clearly would affect the interests of all class members"). Accordingly, this suit may proceed as a class action under Rule 23(b) (1) (B) because an "adjudication[] with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudications. . . ." Fed. R. Civ. P. 23 (b) (1) (B).

II. Summary Judgment

A. Standard of Review

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) .

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita_Elec. Indus. Co., Ltd. v. Zenith Radio., Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)7. As this court has stated, summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E. D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247-48. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125.

In this case, this court must review the general policy of the agency. As such, this court's focus will be on the administrative record. Review of the administrative record is primarily a legal decision, readily resolvable by summary judgment. Citizens for Scenic_ River Bridge Inc. v. Skinner, 802 F. Supp. 1325, 1332 (D. Md. 1991).

B. Analysis

In this case, both parties have moved for summary judgment. In their motion, defendants argue that the court should dismiss this case for the following two reasons: first, because plaintiffs have failed to exhaust their administrative remedies; second, because plaintiffs lack standing because they suffered no injury to a legally protectable interest. Plaintiffs move for partial summary judgment on their breach of contract and due process claims. The court will first discuss the issue of exhaustion and will then turn to the breach of contract and standing issues, which are connected. The court will then address the violation of due process claim.

1. Exhaustion of administrative remedies

Defendants allege that plaintiffs were required to exhaust their administrative remedies before bringing suit against the USDA in federal court. Defendants argue that the failure to exhaust administrative remedies is a jurisdictional bar to suit.

Plaintiffs respond that: 1) the agency's administrative appeal procedures were not available here; 2) plaintiffs attempted to exhaust their remedies

but were repeatedly rebuffed by the USDA; and 3) plaintiffs are willing to continue to attempt to exhaust their remedies, but to do so would be futile.

Defendants assert that under 7 U.S.C. § 6912(e), plaintiffs were required to exhaust their administrative remedies. Section 6912 (e) states

> (e) Exhaustion of administrative appeals Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against
>
> (1) the Secretary;
>
> (2) the Department; or
>
> (3) an agency, office, officer, or employee of the Department.

However, unlike instances in which the challenged agency conduct is personally "adverse to the individual participant," if the agency determines that the challenged agency conduct is "a matter of general applicability," the issue is not appealable. 7 C. F. R. § 780.2(c) (providing that "[n]o reconsideration or appeal may be sought under this part of any general program or provision or program policy, or any statutory or regulatory requirements that is applicable to all similarly situated applicants"). Nevertheless, a plaintiff may appeal the issue of whether the matter is appealable by asking the Director of NAD for a final decision. 7 u. s. C. § 6992 (d) ; 7 C. F. R. § 11. 6 (a) (2). This appeal must be made within thirty days after the agency determines that the matter is not appealable. 7 C.F.R. § 11. 6 (a) (1). If the Director upholds the non-

appealability decision, that decision becomes the final decision of the agency. Id.

Plaintiffs' repeated and voluminous contact with the RMA shows that they attempted to exhaust their administrative remedies. On November 12, 2002, a week before filing their suit in this court, plaintiffs first wrote the NAD director, asking him for a ruling that the farmers' claims were not appealable because they involved a matter that was applicable to all similarly situated petitioners. (Record at Vol. 3 pp. 10-46.) In the ensuing letters between the two, the RMA stated that the disputes over the crop insurance contracts were between the farmers and their individual insurance companies. (Record at Vol. 1 pp. 1055, 1040.) The RMA denied the farmers' request for a hearing on the matter. (Record at Vol. 3 p. 83.) On April 15, 2003, the RMA sent a letter to plaintiffs stating that "no reconsideration or appeal may be sought because [Bulletin MGR-02-016] is a general program provision that is applicable to all similarly situation participants." (Record at Vol. 1 p. 1055.) However, this letter did not inform plaintiffs of their right to appeal the appealability determination. Id.; see Parker v. USDA, No. 1:01CV00057 LMB, at 7 (E. D. Mo. March 12, 2003) (stating that " [e]xhaustion is not required where a plaintiff is not apprised of appeal procedures") citing Conley v. Pitney Bowes, 34 F.3d 714, 717-18 (8th Cir. 1994)). The government later informed plaintiffs of their right to appeal the appealability determination, by letter dated July 10, 2003. (Record at Vol. 1 p. 1040.) The July 10, 2003, letter stated that "[i]f you disagree with this determination that the matter in dispute is not appealable, you can have this determination reviewed by the Director of [NAD] in accordance with

7 C.F.R. § 11.6." (Id.) As plaintiffs did not dispute that the matter was one of general applicability and thus not appealable, they did not immediately ask to have the determination reviewed by the Director of NAD. When plaintiffs later sought reconsideration of the decision, the RMA replied, "To the extent that you seek to appeal NAD determinations concerning appealability, 7 C.F.R. § 11.6(a) (2) and (3) provide that such determinations are not appealable, whether issued by the Director or his delegate." (Record at Vol. 3 p. 143.) Defendants now argue that plaintiffs should have requested a review of the July 10, 2003, letter. [12]

Defendants argue that plaintiffs' failure to exhaust administrative remedies deprives this court of subject matter jurisdiction. They point to cases from outside the Fourth Circuit which have held that the exhaustion requirement in 7 U.S.C. 5912 (e) is jurisdictional. See Bastek v. Fed. Crop Ins. Corp .,145 F. 3d 90, 94 (2d Cir. 1998) (stating that "plaintiffs' argument that their broad challenges to FCIC calculations could not adequately have been presented within normal administrative channels is itself an argument that was required to be tested and exhausted before being presented in federal court."); Utah Shared Access Alliance v. Wanner, 98 F. Supp. 2d 1323, 1333 (D. Utah 2000) (concluding that "[p]laintiffs' failure to exhaust existing administrative remedies deprives this court of competent subject matter jurisdiction" but also stating that "[a] court may excuse exhaustion if administrative remedies would be futile, when administrative remedies would provide inadequate relief, or when the agency has adopted a policy or practice of general applicability which is contrary to law"); Calhoun v. USDA Farm Serv. Agency, 920 F.

Supp. 696, 700 (N. D. Miss. 1996) (stating that "[w]hen the requirement is mandated by statute, exhaustion becomes a jurisdictional prerequisite to maintaining an action"). However, other courts have held that a failure to exhaust administrative remedies under § 6912(e) does not deprive a court of jurisdiction. See McBride Cotton & Cattle Corp. v. Veneman, 290 F.3d 973, 980 (9th Cir. 2002) (holding that "7 U.S.C. § 6912(e) does not limit the district court's subject matter jurisdiction over the plaintiffs' claims"), cited in Rain.& Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp., 229 F. Supp. 2d 710, 714 n.4 (S. D. Tex. 2002); Parker v. USDA, No. 1:01CV00057 LMB, at 9 (stating that "a plaintiff's failure to exhaust administrative remedies under § 6912 (e) does not divest the court of subject matter jurisdiction"). The Fourth Circuit has not directly addressed whether the requirements in § 6912(e) are jurisdictional.

In Gold Dollar Warehouse Inc. v. Glickman, 211 F.3d 93 (4th Cir. 2000), the Fourth Circuit addressed the petitioners' challenges to USDA regulations. The court found that the petitioners were required to exhaust their "as-applied" challenges to the regulations through the agency's appeal procedures but were not required to exhaust their facial challenges to the regulations. Gold Dollar Warehouse, Inc. v. Glickman, 211 F.3d at 99-101. The court stated that "a direct facial challenge to the regulations ... cannot be brought within the agency's appellate process because, as noted, 7 C. F. R. § 11. 3 (b) precludes agency review of USDA regulations." Id. at 99.

Similarly, under 7 C.F.R. § 780.2, the plaintiffs' challenge to the agency's generally applicable program

provision could not be brought within the agency's appellate process. Like the facial challenges in Gold Dollar Warehouse, this case involves a legal challenge to agency action and does not involve underlying factual disputes. The District of North Dakota has concluded that where a plaintiff challenges a generally applicable agency action, 7 U.S.C. § 6912(e) does not require exhaustion. Wiley v. Glickman, No. CIV A3-99-32, 1999 WL 33283314, at *2 (D.N.D. Apr. 7, 1999). In that case, the court stated that "[s]ince this claim features purely legal questions which require no agency fact-finding, none of the purposes of the exhaustion requirement would be served by requiring plaintiffs to submit the claim to NAD." Id.; see also Kuster v. Veneman, 226 F. Supp. 2d 1190, 1192 (D.N.D. 2002) (stating that it would be fruitless to require exhaustion in a case involving a purely legal challenge to a generally applicable agency action). In accordance with Gold Dollar Warehouse and Wiley v. Glickman, this court concludes that because agency review was not available for plaintiffs' challenge to generally applicable program policies, administrative exhaustion is not required.

2. Breach of contract

The most hotly contested issues in this case are whether the insurance contracts guaranteed coverage at the quota price election of $0.31 and whether the government breached those contracts. Defendants frame these issues as standing issues. They point to Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), for the proposition that in order to have standing, plaintiffs must show an actual injury to a legally-protected interest. Defendants contend that

plaintiffs had no legally-protected interest in receiving $0.31 per pound in insurance coverage. specifically, defendants argue that the policies did not guarantee the farmers that they would receive coverage at the $0.31 election level and that the farmers had no constitutionally-protected interest in the continuation of the quota system. The court believes that the issue of whether the plaintiffs have a contractual right to insurance coverage at $0.31 is not merely a standing issue, but will ultimately determine whether plaintiffs have established their claim for breach of contract.

For the court to find that the government breached its contracts, the court must first find a prima facie breach, that is, it must find that the government violated the express provisions of the contract. If a prima facie breach is shown, the court must then consider whether the government has a valid defense under the sovereign acts doctrine or the unmistakability doctrine.[13] Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 762 (2003) (framing government's breach of contract as two separate issues - -"[w]as there a prima facie breach here?" and " [d]oes the unmistakability doctrine shield defendant from liability?") . "Only if [the government's actions are not covered by these doctrines] can the court then say, with confidence, that defendant[s] actually breached the contracts in question." Id.

a. Prima facie breach of contract

Government contracts are subject to the general rule that "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between

private individuals." Lynch v. United States, 292 U.S. 571, 579 (1934). Accordingly, the court must use general contract principles to determine whether the government has breached the insurance contracts.

Defendants' primary argument is that the government did not contractually promise or guarantee insurance coverage at $0.31 per pound. Defendants argue that in order to receive insurance coverage and proceeds at the $0.31 election level, a farm must have been assigned a farm poundage quota by the FSA. Because the Farm Security Act eliminated the quota system, they argue, the FSA did not establish poundage quotas for individual farms for the 2002 crop season, and as a result, the farmers did not have insurance at the election level for quota peanuts.

Defendants point to language in the insurance policy to support their position. Section 3 of the Peanut Crop Provisions provides, in pertinent part:

> Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.
>
> (b) The maximum pounds that may be insured at the quota price election are the lesser of:
>
> (1) The effective poundage marketing quota; or
>
> (2) The insured acreage multiplied by the production guarantee. If the insured acres multiplied by the production guarantee exceeds the effective poundage marketing quota, the difference will be insured at the non-quota peanut price election.

In turn, the policy defines the term "effective poundage marketing quota" as:

> The number of pounds reported on the acreage report as eligible for the average support price per pound ..., **not to exceed the Marketing Quota established by FSA for the farm serial number**.

(Peanut provisions § 1, emphasis added.) According to defendants, under the definition of "effective poundage marketing quota", an individual farm did not have any peanuts eligible to be quota peanuts unless and until the FSA assigned a marketing quota to that farm. That is, the assignment of a farm poundage quota was a condition that must be met for the farmers to receive coverage at the quota price election. Because the farms had not been assigned a farm poundage quota by the FSA, defendants argue, the farmers' insurance coverage defaulted to coverage at the non-quota price election. Furthermore, defendants argue, the contract never guaranteed that the FSA would assign a marketing quota to each farm serial number.

The government's argument overlooks the fact that in some instances a contractual condition may be excused. Specifically, the Restatement (First) of Contracts 295 provides that a condition is excused if 1) a promisor prevents or hinders the occurrence of a condition, and 2) the condition would have occurred except for such prevention or hindrance.[14] Restatement (First) of Contracts § 295 (1932), quoted in Powers v. Sims and Levin, 542 F. 2d 1216, 1226 (4th Cir. 1976) (Winter, J., concurring and dissenting).

The Farm Security Act repealed 7 U.S.C. § 1358-1, which had provided that "[a] farm poundage quota for each marketing year shall be established...." 7 U.S.C. § 1358-1 (b) (1) (A)(2001) (emphasis added). Thus, prior to the passage of the Farm Security Act, the FSA was under a statutory duty to assign quotas to individual farms. The FSA instructed its county offices not to allocate the current year peanut quota and pointed to the Farm Security Act, which had not yet been passed, as the reason. (Notice PN-652, Record at Vol. 2 p. 8, stating that "[b]ecause of pending legislation, rollover of peanut files will be completed without allocating 2002 peanut quota holders.") As the FSA would have assigned the farm poundage quotas had the Farm Security Act not prevented or hindered it from doing so, the second prong of § 295 is met.

The first prong of § 295 is also met. The government not only was a promisor on the insurance contract and was bound by its terms, but also is responsible for the actions of the FSA, as the FSA, like the RMA, is an agency of the United States Department of Agriculture. By passing the Farm Security Act, which repealed 7 U.S.C. § 1358-1 and thus eliminated the FSA's duty to allocate the peanut quota to individual farms, the government "prevent[ed] or hinder[ed] the occurrence of a condition."

The facts of this case fall squarely into the language of the Restatement § 295. Section 295 provides the following illustration on its application:

> A promises to build a house for B who, in consideration therefor, promises A to pay him $10,000 on condition that A presents a certificate

> from C, an architect, showing that the work has been properly done. The work is properly done, but B induces C to refuse to give a certificate. The condition is excused.

This illustration is almost identical to the peanut farmers' situation. Peanut farmers (A) bought insurance from the government (specifically, the FCIC) (B), which promised to pay them $0.31 per pound of peanuts, provided that the FSA (another branch of the government) (C) said that the peanuts grown are quota peanuts. The farmers performed all their obligations, but the government (Congress this time) caused the FSA to refuse to assign the quotas. As in the illustration, the condition will be excused.[15]

The court agrees with the reasoning behind the Restatement (First) of Contracts § 295. The court believes that it was fundamentally wrong for the government to tell the farmers that they would have insurance coverage at $0.31 per pound for as many peanuts as the FSA declared to be quota peanuts, and then, after the farmers had planted their crops, to tell the FSA not to declare any quota peanuts. Under general contract law principles as expressed in the Restatement of Contracts § 295, the court finds that the condition is excused, and that the government breached its contract by refusing to pay the farmers' insurance claims at the rate of $0.31 per pound.

b. Sovereign act and unmistakability doctrines

In the case of United States v. Winstar Corp., 518 U.S. 829 (1996), the Supreme Court discusses the sovereign acts doctrine and the unmistakability

doctrine at length. Several subsequent cases have analyzed and interpreted Winstar and preceding cases on these doctrines. See Yankee Atomic Elec. Comp. v. United States, 112 F.3d 1569 (Fed. Cir. 1997) (discussing the sovereign acts doctrine and the unmistakability doctrine); Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751 (2003) (discussing the unmistakability doctrine); Gen. Dynamics Corp. v. United States, 47 Fed. Cl. 514 (2000) (discussing the sovereign acts doctrine and the unmistakability doctrine).

In General Dynamics Corp. v. United States, the Court of Federal Claims provided the following overview of these doctrines:

> In analyzing whether a particular exercise of sovereign authority breaches a contract between the government and a private party, two longstanding doctrines applicable to contracts with the sovereign come into play. One is the sovereign acts doctrine, which excuses the government from performing a contractual obligation if performance is rendered impossible by a public and general sovereign act. ... The doctrine was recognized by the Supreme Court in Horowitz v. United States, 257 U.S. 458, 461 (1925), which noted that `[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.' More recently, the Federal Circuit reiterated this principle in similar language: `Under the sovereign act

> doctrine, the United States as contractor will not be held responsible for the acts of the United States as sovereign.' Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953, 958 (Fed. Cir. 1993).

Gen. Dynamics Corp. v. United States, 47 Fed. Cl. at 533-34. Under the unmistakability doctrine, "a government will not be deemed in a contract to surrender a sovereign power unless it does so unmistakably." Id.

This court will follow the following framework set forth by Yankee Atomic, as explained by General Dynamics:

> [T]he analytical approach set forth by the Federal Circuit in deciding Yankee Atomic ... was a two-step analysis which first explored the question of whether the governmental action preventing performance of a contract was a 'public and general' act within the meaning of the sovereign acts doctrine. After an affirmative conclusion on that issue, the second question to explore was whether the contract contained an unmistakable promise that the Government would refrain from exercising its sovereign power in a way that could block performance of the contract. If the answer to that question was also yes, then the governmental action at issue would constitute a breach of contract.

Gen. Dynamics Corp. v. United States, 47 Fed. Cl. at 541. If, under the first step, the governmental action in question was not a `public and general' act, then the

sovereign acts doctrine would not constitute a valid defense to the breach of contract claim and the court would not need to proceed to the second step of the analysis. d. (stating that " [i]f the Federal Circuit had meant to decide Yankee Atomic on the basis of the unmistakability doctrine regardless of whether the legislation at issue in that case was a `public and general' act, there would have been no reason for the court to apply, and discuss at length, the sovereign acts doctrine for the purpose of determining the nature of the act"); see also Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. C1. at 774 (stating that authorities agree that "at least in the context of legislation, the unmistakability doctrine applies only when the congress invokes one of the sovereign power protected by the doctrine").

The plurality opinion in Winstar stated that "the sovereign acts doctrine ... balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." United States v. Winstar, 518 U.S. at 896. The application of the sovereign acts doctrine, then, is "not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts." Yankee Atomic Elec. comp. v. United States, 112 F.3d at 1575.

Under Minstar, acts that are "public and general" are acts of the sovereign and are not attributable to the government as contractor. United States v. Winstar, 518 U.S. at 895-96. Winstar provides further guidance

as to what constitutes a "public and general" act. If the action's "impact upon public contracts is ... merely incidental to the accomplishment of a broader governmental objective," then the act is "public and general." Id. at 898. Conversely, "a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations." Id.

Under the framework created by the Federal Circuit in Yankee Atomic, the court must first decide whether the government, in enacting the relevant provisions of the Farm Security Act of 2002, was (i) acting for the purpose of retroactively decreasing the amount of coverage of its insurance contracts with the peanut farmers, or (ii) acting for a more general purpose, for the benefit of the public. For the reasons that follow, the court concludes it was for the former.

The Farm Security Act had a very broad scope, occupying 406 pages in the Statutes at Large and containing more than 400 numbered sections. See Pub. L. No. 107-171, 116 Stat. 134. The stated purpose of the Act was very general, "[t]o provide for the continuation of agricultural programs through fiscal year 2007, and for other purposes." 116 Stat. 134. The Act dealt with, among other topics, direct and counter-cyclical payments to farmers, peanuts, sugar, dairy, wetlands conservation, grasslands conservation, environmental quality incentives, agricultural trade development, the food stamp program, child nutrition programs, farm loans, farm and rural development, rural electrification, various research programs, forestry assistance, and animal health and welfare. However, the length and breadth alone do not make the act "public and general" -

- "any act of repudiation can be buried in a larger piece of legislation, and if that is enough to save it then the Government's contracting power will not count for much." Winstar, 518 U.S. at 903 n.52. Rather, the court must look at the relevant provisions of the Farm Security Act.

The provisions of the Farm Security Act that relate to peanuts are found in sections 1301 through 1310. Section 1309 terminates the quota program for peanuts and provides compensation for peanut quota holders for the loss of the quotas. Sections 1301 through 1308 contain other various changes for peanut farmers, including the availability of counter-cyclical payments for farmers. Section 1310(a) repealed the authority for the price supports for quota peanuts found in 7 U.S.C. § 7271. Section 1310(c) stated as follows:

> (C) TREATMENT OF CROP INSURANCE POLICIES FOR 2002 CROP YEAR.—
> (1) APPLICABILITY.-- This subsection shall apply for the 2002 crop year only notwithstanding any other provision of law or crop insurance policy.
> (2) PRICE ELECTION.– The nonquota price election for segregation I, II, and III peanuts shall be 17.75 cents per pound and shall be used for all aspects of the policy relating to the calculations of premium, liability, and indemnities.
> (3) QUALITY ADJUSTMENT.— For the purposes of quality adjustment only, the average support price per pound of peanuts shall be a price equal to 17.75 cents per pound. Quality under the crop insurance

> policy for peanuts shall be adjusted under procedures issued by the Federal Crop Insurance Corporation.

Section 1310 (c) directly stated that the nonquota price election, which it raised to $0.1775 from $0.16, would be used for all calculations of coverage under the insurance contracts, "notwithstanding an other provision of law or crop insurance policy." (Emphasis added.) This provision of the Farm Security Act obviously and specifically targeted the contractual obligations under the peanut farmers' pre-existing crop insurance policies for the 2002 crop year. Thus, the reduction of insurance coverage was direct, not "merely incidental to the accomplishment of a broader governmental objective."

This provision is similar to the legislation involved in Cuyahoga Metropolitan Housing Authority and General Dynamics, Corp., in which Congress specifically targeted pre-existing contracts in order to save money. It also similar to the legislation in question in Winstar, in which Congress, in passing legislation attempting to resolve the crisis in the savings and loan industry, caused the government to breach its contracts with banks that had allowed banks to count supervisory goodwill as core capital. In Winstar, the Court noted that opponents of the legislation complained that "[i]n its present form, [FIRREA] would abrogate written agreements made by the U.S. government to thrifts that acquired failing institutions by changing the rules in the middle of the game." United States v. Winstar, 518 U.S. at 900.

Most of the comments surrounding the peanut provisions in the Farm Security Act note that the new

peanut rules bring treatment of peanuts into parity with the treatment of other crops. Senator Miller, from Georgia, noted that the changes in the peanut program were painful to but ultimately beneficial for farmers. 148 Cong. Rec. 53922, 53933 (May 7, 2002) (statement of Sen. Miller). However, an opponent of the Farm Security Act, who was concerned not with peanuts but with wheat, stated that he had introduced legislation that would have addressed some of the problems with the Farm Security Act. He stated:

> I introduced this package for two reasons: our producers and our lenders needed some kind of certainty on the assistance they would receive for this crop year, and second, virtually all planting and lending decisions had already been made for the 2002 crop, this year's crop, and it did not make sense to change the rules of the game in the middle of the- 2002 crop year. It made more sense to do an assistance package this year and have the new bill apply to the 2003 crop after our producers and the Department of Agriculture had time to digest the details of the new bill.

148 Cong. Rec. 53979, 3980 (May 8, 2002) (statement of Sen. Roberts) (emphasis added).

The statutory text makes it clear that § 1310(c) of the Farm Security Act specifically targeted coverage under existing crop insurance contracts. By including this provision in the Act, Congress was indeed "changing the rules in the middle of the game." As the Court of Federal Claims explained in General Dynamics,

> While there is no question that the Government had the sovereign right to enact a prospective [reduction in contractual benefits] -- i.e., applicable to any and all government contracts executed after the act was passed - the application of the [reduction] to pre-existing contracts ... constituted an abrogation of the Government's contractual obligations. Thus, it is a classic example of legislation `attributable to the Government as contractor' and 'tainted by a governmental object of self-relief.'

Gen. Dynamics Corp. v. United States, 47 Fed. Cl. at 542 (uotin United States v. Winstar, 518 U.S. at 896).

In conclusion, the court finds that the congressional act reducing crop insurance coverage on peanuts for the 2002 crop year was not a "public and general" act; therefore, the sovereign acts doctrine does not allow the government to escape its contractual obligations under the 2002 crop insurance policies. Furthermore, because the governmental act was not "public and general", the unmistakability doctrine does not apply. See Gen.-Dynamics Corp, v. United States, 47 Fed. C1. at 541.

The plaintiffs have satisfied their burden of showing a prima facie breach of contract and the defendants do not have a valid defense. Therefore, the court finds that the reduction of coverage under the insurance contracts from $0.31 per pound to $0.1775 per pound was not in accordance with law. 5 U.S.C. § 706 (1)(A). Accordingly, the court will grant plaintiffs' motion for summary judgment as to the breach of

contract claim and will deny defendants' motion on the same.

3. Violation of due process

Plaintiffs point to the Supreme Court case of Lynch v. United States for support for their argument that defendants violated their due process rights. The court in Lynch described due process as it relates to government contracts in the following way:

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

Lynch v. United States, 292 U.S. at 579 (citations omitted). The court emphasized that:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Id. at 580 (citing The Sinking Fund Cases, 99 U.S. 700, 719 (1878)).

As in Lynch, plaintiffs' due process claims are based on contracts with the government that were granted and later taken away by statute. As in Lynch, then, the plaintiffs' due process arguments are primarily based on their contract claims. Defendants acknowledge that "in the end analysis, in evaluating whether the defendants' erred in their interpretation of the MPCI policy, 'ordinary principles governing contracts and their interpretation remain applicable.'" (Defs.' Response at 16.)

As the court has already discussed the plaintiffs' contract claim at length and found for the plaintiffs as to this claim, the court need not reach plaintiffs' due process claims.[16]

CONCLUSION

The court hereby orders that this case shall proceed as a class action and hereby certifies the following class:

> Peanut farmers whose farms are located in the Eastern District of North Carolina, who had insurance coverage on peanuts under the 2002 Peanut Multiple Peril Crop Policies, who had losses for the 2002 crop year, who settled those losses for $0.1775 per pound, and who had been assigned farm poundage quotas for the 2001 crop year.

The court hereby appoints the following plaintiffs as class representatives: Marvin Taylor Barnhill, Jerry Hamill, John Branham, Clark Jenkins, Tom Clements, David Grant, Tim Phelps, and Tommy

Flythe. Philip R. Isley, G. Eugene Boyce, and R. Daniel Boyce shall represent the certified class.

For lack of subject matter jurisdiction, the court hereby dismisses all plaintiffs who do not have peanut farms in the Eastern District of North Carolina, including Jim Ferguson, Glen Hawkins, Billy Bain, Glen Moore, R. L. Smith, H. Steven Allen, and all plaintiffs listed in Exhibit B to plaintiffs' motion to join additional plaintiffs, filed November 19, 2002.

For the foregoing reasons, the court grants the plaintiffs' motion for summary judgment on its breach of contract claim and denies the defendants' motion for summary judgment.

Class representatives shall have fifteen (15) days from the date of this order to file a proposed notice for class members.

Malcolm J. Howard, Senior District Judge.

Footnotes

[1]Of the 461 plaintiffs, 274 are from North Carolina, 185 are from Virginia, and 2 are from South Carolina.

[2]The court is aware that similarly situated peanut farmers have filed complaints in the Court of Federal Claims and in federal district courts in Virginia, Texas, Alabama, Georgia, Florida, and South Carolina. Additionally, the plaintiffs have filed documents with the Judicial Panel on Multidistrict Litigation. However, as pendency before the panel does not affect pretrial jurisdiction of this court, this court will currently decide the motions before it.

[3]The court will collectively refer to the defendants as "the government."

[4]The sections of the Farm Security Act that relate to peanuts are codified at 7 U.S.C. 7951-7960.

5Though defendants dedicate a section of their response to plaintiffs' motion for summary judgment to "disputed facts," defendants do not actually dispute any of the dispositive facts, but merely the legal conclusions that may follow from them.

[6]The cancellation and termination date for Virginia, New Mexico, and Oklahoma, and some Texas counties was March 15, 2002. (Peanut provisions § 5.) Some other Texas counties were subject to a January 15, 2002, cancellation and termination date, and the February 28, 2002, cancellation and termination date also applied to some counties in Texas and to all other states. The sales closing date in Virginia was March 15, 2002. For Virginia peanut farmers, the initial planting date was April 11, 2002, and the final planting date was June 10, 2002. (V.A. Special Provisions.)

[7]The Eastern District of North Carolina consists of the forty-four counties east of Raleigh, including Wake County. Most of the peanuts grown in North Carolina are grown in these counties; the only county outside the Eastern District which grows a significant amount of peanuts (more than fifty acres) is Scotland County, in the Middle District of North Carolina. See The Peanut Farmer, Acreage Map, available at http://www.peanut farmer. com/ acreage/pfmap.pdf.

[8]While the plaintiffs did not specify in their filings how many of these North Carolina farmers are from the Eastern District of North Carolina, they later indicated that only the Lassiters, from Moore County, are from another North Carolina district. As stated above, the court has subject matter jurisdiction only over plaintiffs

from the Eastern District of North Carolina, and the court will dismiss all farmers from outside this district.

[9]The court believes that it is better to address defendants' concern that most or all of the plaintiffs have not exhausted their administrative remedies as a substantive inquiry rather than a certification issue. Furthermore, the court believes that the argument that some farmers have assigned their insurance proceeds to banks is more appropriately addressed at the damages stage.

[10]on the same day that they filed their complaint, the named plaintiffs moved to join over 400 additional plaintiffs. The court allowed the joinder of these additional plaintiffs previous to this order, and so there are currently 461 named plaintiffs. Exhibit A to plaintiffs' motion lists the North Carolina plaintiffs to be added and Exhibit B lists the Virginia plaintiffs.

[11] Although the complaint indicates clearly that the first four farmers farm and reside in the Eastern District of North Carolina, it did not specify whether the remaining ten plaintiffs farmed in Virginia, North Carolina, or both because farms in both Virginia and North Carolina, as well as a small section in South Carolina, were part of the Virginia-Carolina growing region and were all subject to regulation by the Raleigh, North Carolina, Regional RMA office.

[12] As a side note, the court believes that the guidance that the agency gave to the farmers as to whether the farmers should appeal the ruling was at best confusing, and at worst positively misleading. It makes no sense for an agency to tell a petitioner that his issue is non-appealable, and then in the next sentence tell him that he can -- and must -- appeal the decision. See Parker v. USDA, No. 1:01CV00057 LMB, at 6-7 (stating that "the government is attempting to 'have its cake and eat it

too,' by informing plaintiffs that their claims were not appealable to the NAD and then asserting exhaustion for failure to appeal to the NAD when plaintiffs bring those claims in federal court").

[13]Neither plaintiffs nor defendants have fully briefed the issues of whether the sovereign acts doctrine or the unmistakability doctrine are valid defenses under the current facts. The plaintiffs noted that in United States v. Winstar Corp., 518 U.S. 839 (1996), the Supreme Court rejected these defenses. Defendants stated in a footnote that they did not brief these issues because they believed that discussion of any "special defense" on the merits was premature. The court believes that the government should have raised both defenses in its response to the plaintiffs' motion for summary judgment. Nevertheless, because the application of these doctrines to this case is a purely legal issue and does not require any further facts from the parties, the court will address these defenses.

[14]The full text of § 295 is as follows:

> 295. Excuse of Condition By Prevention Or Hindrance
>
> If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless
>
> (a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party; or
>
> (b) the terms of the contract are such that the

risk of such prevention or hindrance as occurs is assumed by the other party.

[15]Under § 295(b) , the condition is not excused if "the terms of the contract are such that the risk of such prevention or hindrance as occurs is assumed by the other party." This subsection does not apply here. The terms of the contract nowhere indicate that the peanut farmers were to bear the risk of regulatory change. Indeed, the insurance program was set up in such a way as to provide a measure of reliability and stability for a way of life which is by nature unreliable. "From [the] origin [of the Federal Crop Insurance Act of 1938], the stated purpose of the federal crop insurance program has been `to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance."' Wiley v._ Glickman, 1999 WL 33253312, at *1 (citing 7 U.S.C. § 1502(a)). Furthermore, the goal of the Federal Crop Insurance Act of 1984 was to make federal crop insurance 'the farmers' primary source of risk management." Id. (citing 1994 U.S.S.C.A.N. at 2519). In furtherance of these goals, the crop insurance and peanut quota systems provided deadlines that the farmers could rely on in making planting decisions for the upcoming crop year. The insurance contract guaranteed that the price election could not be decreased after the contract change date, which for the 2002 crop year was November 30, 2041. (Peanut provisions §§ 4b, 3e.) Also, by law, the U.S.D.A. was required to announce the national peanut quota by December 15 of the year preceding the crop year. 7 U.S.C. § 1358-1(a)(3) (2001).

[16]The court notes that the Court of Federal Claims has recently ruled that the peanut quota is not a property right sufficient to support a takings claim under the Fifth Amendment. See Members of the Peanut Quota

Holders Ass'n v. United States, 60 Fed. Cl. 524, 525 (2004). This decision is irrelevant to the current plaintiffs' claim, as the Federal Claims Court's decision was based solely on the claimed statutory entitlement to the peanut quotas whereas the current plaintiffs' claim is based on the insurance contracts.

Filed 12//20/06
United States District Court
for the Eastern District of North Carolina,
at Greenville.

Master Docket No. 4:05-CV-8-H2 ALL CASES
In re Peanut Crop Insurance Litigation, MDL-1634

ORDER

This matter is before the Court on defendants' motion to dismiss or alternatively for summary judgment, and plaintiffs, motion for class certification and summary judgment, in cases transferred from the Southern District of Georgia and the Northern, Southern, and Western Districts of Texas.

I. Barnhill v. Davidson (E.D.N.C.)

By order dated July 22, 2004, in the case of Barnhill v. Davidson, No. 4:02-CV-159-H{4} (E.D.N.C.), this Court granted the plaintiffs, summary judgment motion on their breach of contract claim and denied defendants' cross-motion for summary judgment. The court also certified the following class:

> Peanut farmers whose farms are located in the Eastern District of North Carolina, who had insurance coverage on peanuts under the 2002 Peanut Multiple Peril Crop Policies, who had losses for the 2002 crop year, who settled those losses for $0.1775 per pound, and who had been assigned farm poundage quotas for the 2001 crop year.

July 22, 2004 Order at 48.

Defendants' motion for reconsideration of the July 22, 2004, order was denied on January 26, 2005.

II. First Group of Transferred Cases

On October 26, 2004, the Judicial Panel on Multidistrict Litigation ordered that six actions pending in six other district courts (Middle District of Alabama, Northern District of Florida, Middle District of Georgia, District of South Carolina, Eastern District of Texas, and Eastern District of Virginia) raising the identical claims for relief be transferred to this district for consolidated pretrial proceedings ("First Transferee Cases"')

On March 31, 2005, the Court granted summary judgment for plaintiffs on their breach of contract claim, denied summary judgment for defendants, and denied defendants' motion for reconsideration in each of the First Transferee Gases. The Court also ordered certification of a district-wide class corresponding to the originating district in each of the First Transferee Cases.

III. Consolidated Damages Order

Also on March 31, 2005, the Court entered an order covering all consolidated cases in the Master Docket setting forth the formula for calculation of damages.

IV. Second Group of Transferred Cases

On June 21, 2006, the judicial Panel on Multidistrict Litigation (JPML) ordered the transfer to this district

of nine new cases raising the identical claims for relief

1. Alabama Peanut Farmers v. United States, No. 2:06-324 (M.D. Ala.) [FDNC Case No. 4:06-CV-161-H]

2. Texas Peanut Farmers v. United States, No. 5:06-CV-83 (N.D. Fla.) [EDNC Case No. 4:06-CV-162-H]

3. Georgia Peanut Farmers v. United States, No. 1:06-CV-54 (M.D. Ga.) [EDNC Case No. 4:06-CV-163-H]

4. Georgia Peanut Farmers v. United States, No. CV-06-52 (M.D. Ga.) [EDNC Case No. 4:06-CV-129-H]

5. Wallace A. Berry, et al. v. Ross J. Davidson, et al., No. 3:06-CV-1116 (D.S.C.) [EDNC Case No. 4:06-CV-164-H]

6. Texas Peanut Farmers v. United States, No. 2:06-CV-209 (E.D. Tx.) (EDNC Case No. 4:06-CV-144-H]

7. Bill Barnes, et al. v. United States, No. 5:06-CV-73 (N.D. Tx.) [FDNC Case No. 4:06-CV-116-H]

8. David Grsochke, et at. v. United States, No. H-06-1289 (S.D. Tx.) [EDNC Case No. 4:06-CV-122-H] 9. Texas Peanut Farmers v. United States, No. SA-06-CV-322 (W.D. Tx.) [EDNC Case No. 4:05-CV-165-H] The Court directs the

clerk to add these nine cases to Master Docket No, 4:05-CV-8-H2.

A. Duplicate Cases

Five of the newly transferred cases are from the same districts that transferred five of the First Transferee Cases. Those districts are: Middle District of Alabama, Northern District of Florida, Middle District of Georgia, District of South Carolina, and Eastern District of Texas.

Because Class actions have already been certified for each of these districts, the parties have stipulated to the dismissal of the five new cases from these districts, subject to the Government's agreement that, for purposes of any statute of limitations or exhaustion defense with respect to the plaintiffs named in these five cases, those plaintiffs will be deemed to have filed their claims in the appropriate federal district court no latex than February 25, 2003. Based on this stipulation, the Court hereby orders that the following "duplicate" cases are DISMISSED:

No. 4:46-CV-144-H (transferred from E.D. Tx.)
No. 4:46-CV-161-H (transferred from M.D. Ala.)
No. 4:06-CV-162-H (transferred from N.D. Fla.)
No. 4:06-CV-163-H (transferred from M.D. Ga.)
No. 4:06-CV-154-H (transferred from D.S.C.)

B. Non-Duplicate Cases

The remaining four cases transferred by the JPML on June 21, 2006, are from four "new" districts not covered by the Court's previous orders: the Southern District of

Georgia, and the Northern, Southern, and Western Districts of Texas ("Second Transferee Cases").

As to the Second Transferee Cases, the Court hereby orders as follows:

(1) Plaintiffs' motion for summary judgment on their breach of contract claim is GRANTED, and defendants' motions for summary judgment and reconsideration are DENIED, for the reasons set forth in the Court's July 22, 2004 and January 26, 2005 orders in Barnhill v. Davidson.
(2) For the reasons set forth in the July 22, 2004 order in Barnhill v. Davidson, the Court hereby ORDERS certification of a district-wide class corresponding to the originating district in each of the Second Transferee Cases, using the otherwise identical class definition quoted above.
(3) For the reasons set forth in the March 31, 2005 order in the Master Docket, plaintiffs' motion for adoption of a damages formula is granted in part and denied in part, and defendants' motion for adoption of a damages formula is granted in part and denied in part. Damages shall be calculated utilizing the formula set forth in the March 31, 2005 order.
(4) It is further ORDERED that R. Daniel Boyce, G. Eugene Boyce and Philip R. Isley of the law firm, Boyce & Isley, PLLC, shall serve as class counsel for plaintiffs in the Second Transferee Cases. Class counsel shall send the previously approved class notice to all potential class members as soon as practicable as required by Fed. R. Civ. P. 23. Potential class members shall have fifteen days from the date of mailing of the notice to respond.
(5) It is further ORDERED that the following plaintiffs

shall serve as class representatives in each of the transferee cases and that class counsel shall advise class representatives of their duties and responsibilities under Rule 23:

Charles E. Smith Jr.
GEORGIA PEANUT FARMERS, et al. v. UNITED STATES OF AMERICA, et al.
EDNC File # 4:06-CV-129-H2
U.S. Distrcit Court, SDGA, No. CV-06-052

Terry Lee Stacy:
BILLY BARNES, et al. v. UNITED STATES OF AMERICA EDNC File # 4:06-CV-116-H2
U.S. District Court, NDTX, No. 5:05-CV-00730-CECF

Thomas L. Paben DBA TP Farms:
DAVID GROSCHKE, et al. v. UNITED STATES OF AMERICA EDNC File # 4:06-CV-122-H2
U.S. District Court, SDTX, No. H-06-1289

Jimmy Seay:
TEXAS PEANUT FARMERS, et al. v. UNITED STATES OF AMERICA
EDNC File # 4:06-CV-165-H2
U.S. District Court, WDTX, No. SA-06-CST-322-XR

Filed 12/20/06
United States District Court
for the Eastern District of North Carolina,
at Greenville.

Master Docket No. 4:05-CV-8-H2 ALL CASES
In re Peanut Crop Insurance Litigation, MDL-1634

FINAL JUDGMENT (Fed. R. Civ. P. 58)

This Court, having previously entered orders for Summary Judgment, on liability and damages (the Formula for Calculation of Individual Damages), hereby enters Final Judgment in favor of the Plaintiff Class Members and against the Defendants pursuant to Fed. R. Civ. P. 58 in all cases.

The Court finds and therefore Orders pursuant to Rule 54(b), that although more than one claim for relief has been presented and multiple parties are involved, the Court hereby enters Final Judgment in favor of all plaintiffs and class members who presently have cases pending before this Court as to the breach of contract claim. The Court further finds that there is no just reason for delay; and, accordingly, Final Judgment is hereby entered in the amount of thirty million, seventy-one thousand, two hundred forty two dollars ($30,071,242.00), plus interest as allowed by law. The Court retains jurisdiction to the extent necessary to handle all administrative issues after conclusion of any appeal or expiration of the parties' time to appeal this final Judgment.

Filed: 7/8/2008
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1145 (L)
4:06-cv-00164-H;
4:05-cv-00002-H;
4:04-cv-00189-H;
4:06-cv-00163-H;
4:04-cv-00188-H;
4:04-cv-00191-H;
4:05-cv-00008-H;
(MDL-1634)
4:04-cv-00187-H;
4:06-cv-00129-H
4:04-cv-00186-H;
4:02-cv-00159-H;

In Re: PEANUT CROP INSURANCE LITIGATION,
MDL-1634;

MARVIN TAYLOR BARNHILL; JOEY WATFORD; TOM CLEMENTS; FLORIDA PEANUT FARMERS, and others similarly situated; TERRY E. BEASLEY; WALLACE A. BERRY, South Carolina Peanut Farmer and others similarly situated; TEXAS PEANUT FARMERS, in the Southwest Growing Region; GEORGIA PEANUT FARMERS; CHARLES E. SMITH, JR.,
Plaintiffs-Appellees,
v.
ANN VENEMAN, Secretary of Agriculture for the United States of America; ROSS J. DAVIDSON, Administrator for Risk Management Agency; RISK MANAGEMENT AGENCY; UNITED STATES

DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA; FEDERAL CROP INSURANCE CORPORATION; MIKE MOORE, RMA Regional Office Director Valdosta; RON BERRYHILL, RMA Regional Office Director, Oklahoma City, Oklahoma,
Defendants-Appellants.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge King and Judge Floyd, United States District Judge.

Supreme Court, U.S.
FILED
DEC 15 2008
OFFICE OF THE CLERK

No. 08-489

In the Supreme Court of the United States

MARVIN TAYLOR BARNHILL, ET AL., PETITIONERS

v.

ED SCHAFER, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' multi-peril crop insurance policy did not promise to indemnify peanut farmers at higher rates reserved for "quota" peanuts.

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In the Supreme Court of the United States

No. 08-489

MARVIN TAYLOR BARNHILL, ET AL., PETITIONERS

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ED SCHAFER, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 524 F.3d 458. The opinion and orders of the district court (Pet. App. 41a-88a, 89a-94a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. A petition for rehearing was denied on July 8, 2008 (Pet. App. 96a-97a). The petition for a writ of certiorari was filed on October 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal crop insurance program is administered by the United States Department of Agriculture's (USDA) Risk Management Agency through the Federal

Crop Insurance Corporation (FCIC). 7 U.S.C. 1503, 1508; see Pet. App. 6a. It is intended to protect crop producers from unavoidable risks associated with adverse weather, plant diseases, insect infestations, and other specified causes of loss. 7 U.S.C. 1508(b); see, *e.g.*, 7 C.F.R. 457.134, para. 11 (peanut crop insurance provisions). Basic coverage offers insurance against catastrophic risk and will indemnify the farmer for 55% of the estimated market price of the crop, on losses in excess of 50% of the normal yield. 7 U.S.C. 1508(b); 7 C.F.R. 402.1. Participating farmers may also purchase additional insurance that covers a higher percentage of the expected yield and price. 7 U.S.C. 1508(c).

The FCIC is authorized to offer these various insurance policies directly, or it may instead reinsure privately issued policies that it has reviewed and approved for sale to producers. 7 U.S.C. 1508(a), (h)(3) and (k). Since 1998, private insurance companies reinsured by the FCIC have sold and serviced all multiple peril crop insurance authorized under the statute.

2. Before 2002, federal statutes permitted the Secretary of Agriculture to set a national quota on the amount of peanuts that could be marketed for domestic consumption as food. 7 U.S.C. 1358-1 (2000). A second quota was then set by the Farm Service Agency, by allocating shares of the national quota to individual farms on the basis of past production history. Pet. App. 8a. Holders of the right to market peanuts under that quota authority received several substantial benefits. They could sell the crop in the domestic market for use as food, deriving the higher prices dictated by the high value of that end use of the product, and further profiting from regulatory limitations on total supply. Or they

could seek price support benefits by taking out non-recourse loans made available through USDA.

Non-quota or "additional" peanuts—*i.e.*, peanuts intended to be exported or crushed into peanut oil and meal, see 7 U.S.C. 1358-1(e)(1) (2000)—commanded far lower prices and federal support. The supply of peanuts for sale in foreign markets is not limited by United States law, and that use of peanuts for crushing into oil or meal has a lower end-use value than food uses. Moreover, while loan assistance was also available for non-quota peanuts, the federal price support levels on those loans were set far lower. Producers consequently received substantially lower prices for non-quota peanuts. Pet. App. 7a-8a.

3. Petitioners' crop insurance contract defined what insured production, if any, should be treated as production indemnified at quota price levels.

First, the contract required the farmer to identify the acreage that he wished to insure and the amount of such production, if any, that he could insure at quota rates. It thus required an insured producer to file an "acreage report." The acreage report detailed the acreage planted in peanuts and the "effective poundage marketing quota, *if any*, that [was] applicable" to the farm for the current crop year. C.A. App. 56, Peanut Provisions ¶ 6 (emphasis added).[1] The "effective poundage marketing quota" could not exceed the individual farm quota set by the Farm Service Agency. *Id.* at 55, Peanut Provisions ¶ 1; *id.* at 57, Peanut Provisions ¶ 14(b).

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[1] The contract terms consist of basic provisions applicable to all crops, a set of provisions specific to the peanut crop, and certain other special provisions and endorsements. See C.A. App. 43, Basic Provisions ¶ 1 (definition of "Policy").

Second, the contract defined the amount of production that would be guaranteed by the peanut crop insurance policy. That figure, termed the "production guarantee," was based on two criteria: a measure of the farmer's average yield based upon actual production history, and the percentage of that anticipated yield the farmer opted to insure in the coming crop year. C.A. App. 43, Basic Provisions ¶ 1 (definition of "production guarantee"); *id.* at 55, Peanut Provisions ¶ 1 (definition of "Approved yield" and "Production guarantee"); see 7 U.S.C. 1508(g)(2); 7 C.F.R. 400.51-400.56.

Third, the contract defined the price per pound that would be used to compute the insurance premium and any indemnities for covered crop losses. That measure was termed the "Price election" and was generally based on the FCIC's projection of market prices for the commodity. See C.A. App. 43, Basic Provisions ¶ 1; 7 U.S.C. 1508(c)(5)-(6). Price elections differed for quota and non-quota peanuts and reflected the substantially higher price quota peanuts could command in the marketplace. Each respective price election was typically announced just before the commencement of the coming crop year and then incorporated into the insurance contract by a price addendum. See Pet. App. 14a.

Fourth, the contract defined what lost production, if any, should be indemnified at the quota price.[2] Petitioners' contract limited the production indemnified at quota price to the "effective poundage marketing quota." C.A. App. 55, Peanut Provisions ¶ 3(b). Because the "Effec-

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[2] This provision, like the other contract provisions described above, was common to all peanut insurance contracts and was thus included in agreements with both producers who had previously been entitled to quota allocations and producers who had no current or prior right to a quota allocation. 7 C.F.R. 457.2(b), 457.7.

tive poundage marketing quota" could not exceed the individual farm quota set by the Farm Service Agency, C.A. App. 55, Peanut Provisions ¶ 1, indemnification at quota rates was limited by the individual farm quota. Consequently, if an individual farm quota was never set, that quota would be zero and none of that farm's peanut production would be insured at quota rates. See Pet. App. 25a.

Finally, the contract set a "Contract change date." C.A. App. 42, Basic Provisions ¶ 1. All changes to the policy's coverage provisions, price elections, coverage limits, premium rates, and program dates had to be made by the contract change date. For the 2002 crop year at issue here, the contract change date was November 30, 2001. Pet. App. 9a.

4. On the contract change date (November 30, 2001), the price elections for the 2002 crop year were incorporated into the contract. They established a price election of 31 cents per pound for quota peanuts and 16 cents per pound for non-quota peanuts. Pet. App. 14a.

On December 14, 2001, USDA issued a release that set the 2002 national peanut quota based on each state's share of the 2001 quota. C.A. App. 75. That announcement alerted petitioners to the possibility that the peanut quota program could be changed or eliminated by pending legislation:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be replaced with a target price and deficiency payment plan. If pending legislation is enacted as law, the 2002 poundage

> quota and price support announced by this release may be altered or rescinded.

Ibid. On January 15, 2002, USDA issued another announcement, also warning that if the pending "Farm Bill" were "enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded." C.A. App. 78.

Because the pending farm bill would have eliminated the peanut quota system, the Farm Service Agency did not set the 2002 peanut quotas for individual farms. On May 3, 2002, the Farm Service Agency directed its county officers not to allocate individual farm quotas. Pet. App. 15a.

Ten days later, on May 13, 2002, the President signed the 2002 farm bill, which repealed the peanut quota system and substantially revamped federal assistance for peanut producers. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1309(a), 116 Stat. 179. In lieu of the quota system, this statute provided for a mandated increase—from 16 cents to 17.75 cents per pound—in the "price election" for non-quota peanuts used to compute premiums and indemnity payments under crop insurance policies applicable to the 2002 crop year. § 1310(c), 116 Stat. 182-183. It also continued price supports through non-recourse loans, but at

the non-quota rate of 17.75 cents per pound instead of the quota rate of 31 cents per pound.[3] § 1307(a), 116 Stat. 175-176.

In light of these statutory changes, USDA sent a bulletin to crop insurance companies on May 28, 2002. This bulletin stated that all peanuts were to be treated as non-quota peanuts for purposes of policies covering the 2002 crop year. Pet. App. 16a. Accordingly, all indemnities for 2002 peanut crops were made at the non-quota rate of 17.75 cents per pound. *Ibid.*

5. Petitioners allege (Pet. 16-17) that they are entitled to insurance indemnification for 2002 peanut crop losses at the higher rates previously reserved for quota peanuts. They brought a breach of contract action against the Secretary of Agriculture and other federal officials in the Eastern District of North Carolina. The court certified a class comprised of insured producers whose farms were located within its judicial district and

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[3] The 2002 farm bill also established: (1) a new program of direct payments of $36 per ton (1.8 cents per pound) paid to farmers who had produced peanuts in the previous years (Pub. L. No. 107-171, § 1303(b), 116 Stat. 170); (2) a new price support program of "counter-cyclical" payments, triggered when market prices, in combination with certain other assistance, fall below a target price of $495 per ton (§ 1304(c), 116 Stat. 171); and (3) a quota buy-out program, providing for prior holders of quota authority to receive compensation for the value lost by repeal of the quota system (§ 1309(b), 116 Stat. 180). This latter compensation program authorized owners of farms to which a quota had been allocated to receive five annual payments, computed at the rate of 11 cents per pound of their 2001 peanut quota allotment. § 1309(c) and (d), 116 Stat. 180.

who had been allotted an individual farm peanut quota for the preceding, 2001 crop year.[4]

Ruling on cross-motions for summary judgment, the court held that the government had breached a contractual obligation to insure production previously eligible for the quota rate of 31 cents per pound. Pet. App. 80a-81a. The court principally reasoned that the government, by repealing authority to allocate peanut quotas to insured producers, had prevented the occurrence of a condition that would give rise to that insurance coverage, and that general principles of contract law (as summarized in the 1 Restatement (First) of Contracts § 295 (1932)), bar a party from denying liability if it has itself frustrated the occurrence of a condition that would give rise to liability. Pet. App. 69a-72a. The court further held that neither the "sovereign acts" nor "unmistakability" doctrine afforded a valid defense to liability. *Id.* at 72a-80a.

6. The court of appeals vacated the district court's order granting summary judgment to petitioners and remanded. Pet. App. 1a-40a. The court, applying federal common law to the interpretation of the insurance agreement, concluded that the multi-peril crop insurance policy did not create any contractual obligation to reimburse lost peanut production at quota rates. *Id.* at 23a-24a. Noting that contract terms expressly contemplated the possibility that no quota allotment would be

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[4] The Judicial Panel on Multidistrict Litigation subsequently transferred a group of related cases to the same district court for coordinated or consolidated pre-trial proceedings. Pet. App. 19a; see 28 U.S.C. 1407.

made, it concluded that the contractual obligation to indemnify crop losses at quota rates was contingent on the allocation of individual farm quotas for the 2002 crop year--an allocation that was never made. *Id.* at 23a-29a.

The court recognized that quotas had not been allotted because statutory authority to make a quota allotment had been repealed by Congress, and that common law contract principles hold that a party may be liable for breach of contract if that party hinders the occurrence of a condition on contract performance. Pet. App. 30a. The court held, however, that those contract principles were inapplicable here because the quota allotment was not a true "condition" on the government's obligation to indemnify covered farmers for crop losses (*id.* at 31a-32a), and because the government had never promised to make a quota allotment (*id.* at 31a, 40a n.20). It further concluded that, because the government had not breached the insurance contract, it was unnecessary to address whether the "sovereign acts" or "unmistakability" doctrine afforded the government a defense to liability. *Id.* at 40a n.21.

Finally, the court rejected petitioners' claim that they were entitled to damages because they had detrimentally relied on the expectation that indemnity at quota rates would continue for the 2002 crop year. The court reasoned that significant legislative changes in the quota program had occurred in recent years, and that the Secretary had given farmers timely and specific warning that pending legislation might alter or rescind the peanut quota system. Pet. App. 35a. The court concluded that petitioners' assertions of reliance on continued quota allocations were therefore misplaced. *Id.* at 36a.

ARGUMENT

The court of appeals correctly applied well-settled principles of contract construction to the specific facts of this case. Its holding does not conflict with decisions of this Court or of any other court of appeals. The court of appeals' decision turns only on a narrow question of contract interpretation that does not warrant further review.

1. The court of appeals correctly held that petitioners had no contractual entitlement to indemnification of lost peanut production at quota rates. As the court reasoned (Pet. App. 24a), the contract provided that indemnity at quota rates was contingent on the allocation of individual farm quotas. That is because the contract limited the production indemnified at quota rates to the "effective poundage marketing quota." C.A. App. 55, Peanut Provisions ¶ 3(b). The "Effective poundage marketing quota," in turn, could not exceed the individual farm quota set by the Farm Service Agency. *Id.* at 55, Peanut Provisions ¶ 1. Thus, whenever the Farm Service Agency did not set an individual farm quota, the "Effective poundage marketing quota" for that farm would be zero, so none of that farm's peanuts could be indemnified at quota price. In fact, the contract explicitly contemplated such a scenario, by referring to the "effective poundage marketing quota, *if any*." *Id.* at 56, Peanut Provisions ¶ 6 (emphasis added); *id.* at 57, Peanut Provisions ¶ 14(b) (emphasis added). Consequently, because the Farm Service Agency did not set individual farm quotas for petitioners in 2002, petitioners had no contractual entitlement to indemnity at quota rates for their 2002 crop.

Petitioners argue (Pet. 30-31) that the Farm Service Agency's failure to set individual farm quotas was irrele-

vant and that they had a contractual entitlement to indemnity at quota rates even though they had no quotas. Petitioners assert that the government's performance was conditioned on the allocation of individual farm quotas, and that the government hindered the occurrence of that condition by enacting new legislation repealing the peanut quota system. Pet. 28-29.

The court of appeals correctly rejected that argument, holding that the allocation of individual farm quotas was not a "condition" on the government's obligation to indemnify insured peanut losses. Pet. App. 31a. Only the "occurrence of a natural cause of covered loss" was a condition that triggered the government's duty to indemnify petitioners' 2002 peanut crop loss. *Ibid.* Thus, the repeal of the peanut quota system did not frustrate any "condition" on the government's contractual obligation to reimburse farmers for covered losses. *Ibid.* Indeed, petitioners were reimbursed by the government for their 2002 covered losses, albeit at the lower rate of 17.75 cents per pound. *Id.* at 16a.

Even if the setting of individual farm quotas were a "condition," however, the court rightly noted that the non-occurrence of a condition is not a breach of contract unless the party is under a duty to make that condition occur. Pet. App. 40a n.20 (citing 2 Restatement (Second) of Contracts § 225 (1981)).[5] Here, the government nei-

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[5] The First Restatement of Contracts stated the rule as follows:

> Failure of a condition to exist or to occur even though the condition is some performance by a party to the contract, is not a breach of contractual duty by him unless he has made an enforceable promise that the condition exists or shall occur. Whether he has done so is a question of interpretation.

* * * * *

ther promised to indemnify peanut farmers at quota rates nor promised to maintain statutory authority to make a quota allocation. See p. 10, *supra*; C.A. App. 55-56, Peanut Provisions ¶¶ 1, 6. Thus, even if the allocation of quota authority is assumed to have been a "condition" on the government's liability, the government could not be held liable for the failure of that condition to occur unless it had made an enforceable promise to allocate individual farm peanut quotas, which it had not done.

The court of appeals' construction of petitioners' insurance contract is therefore correct and that fact-bound decision does not present any issue warranting this Court's review.

2. The court of appeals' holding is consistent with the principles of *United States* v. *Winstar Corp.*, 518 U.S. 839, 898 (1996), *Perry* v. *United States*, 294 U.S. 330, 352 (1935), and *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Petitioner cites those cases for the propositions (1) that the government is bound to its contracts to the same extent as private parties, and (2) that, unless the contract provides otherwise, the government may be held liable for breach of contract where Congress enacts legislation that impairs or renders impossible the government's promised contract performance. Pet. 28-29. Petitioners read these cases too broadly.

Illustrations:

1. A promises B to paint a landscape. B promises A to pay $1000 for the painting if B builds a house which he is then planning. B later decides not to build the house and declines to buy the painting. A has no right of action.

1 Restatement (First) of Contracts § 257; accord 2 Restatement (Second) of Contracts § 225(3) (1981) ("Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.").

They merely make "clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and "[t]he extent of that capacity * * * remains somewhat obscure." *Winstar*, 518 U.S. at 876 (plurality opinion) (citing *Perry* and *Lynch*).

Moreover, the conclusion petitioners seek to draw in the second clause quoted above—that one of the parties to a contract, the government, is presumptively liable upon a change in the law—does not follow from the premise that government contracts are generally to be treated in the same manner as private contracts. Which party should be liable turns on which party, if either, should be held to have assumed the risk of a change in the law. Here, unlike in *Winstar* (see *id.* at 881), the government did not assume the risk of a change in the law, and indeed it warned farmers that a change might be imminent which could result in no quotas.

In any event, the court of appeals' decision does not conflict with the broader proposition petitioners assert. The court of appeals simply held that the government had not promised to indemnify petitioners' 2002 peanut crop at quota rates, given the specific language of petitioners' insurance contract. Likewise, petitioners' argument that the government prevented the condition of allocating individual farm quotas from occurring presents no conflict with *Winstar*, *Perry*, and *Lynch*. That argument, too, turns on what the government actually promised in petitioners' insurance contract, which, in turn, depends on the specific language of that contract. As just explained, that contract contained no promise that petitioner would receive farm quotas or be indemnified at the quota rate. In fact, the contract specifically

contemplated that there might not be a quota. See p. 10, *supra*.

In sum, under the court of appeals interpretation of the contract, the principles established in *Winstar* and related cases cited by petitioner have no bearing on the government's contractual liability. Rather, this case presents only a narrow question of contract interpretation pertaining to a unique indemnity scheme that was repealed six years ago.

3. The court of appeals' rejection of petitioners' "promissory estoppel" claim is consistent with settled law and does not present any issue warranting further review. Petitioners argue that they invested in agricultural resources and made financial commitments for the 2002 crop year in the expectation that indemnity at quota rates would continue. Pet. 33. They conclude that their reliance on indemnity at quota rates was reasonable and warrants forcing the government to indemnify lost production at quota rates. Pet. 34. The court of appeals rejected petitioners' estoppel argument, finding that petitioners' reliance on indemnity at quota rates was not reasonable in light of recent modifications in the quota program and clear warnings that repeal of the quota system might be imminent. Pet. App. 34a-36a.

No aspect of that holding warrants further review. Even amongst private parties, the estoppel theory on which petitioners rely requires that the aggrieved party demonstrate that it has changed its position in *reasonable* reliance on representations of the other party. See *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (*Community Health Servs.*). The court of appeals was thus correct in concluding that no estoppel would lie absent *reasonable*, detrimental reliance. Pet. App. 33a-34a. And

its holding that petitioners could not have reasonably relied on indemnity at quota rates in the circumstances presented here is a fact-bound determination that does not warrant further review.

Even if petitioners could establish reasonable, detrimental reliance on some expectation that a peanut quota allocation would have been made, "it is well settled that the Government may not be estopped on the same terms as any other litigant"—if the government can even be estopped at all. *Community Health Servs.*, 467 U.S. at 60. Moreover, "this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds." *OPM* v. *Richmond*, 496 U.S. 414, 434 (1990). And while the Court has left open the possibility that the government might be estopped in some, extraordinary circumstances, it has made plain that a party's mere reliance on a government agent's misstatements of the law is not sufficient. See *Community Health Servs.*, 467 U.S. at 60-61; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947). Petitioners' assertion that the court of appeals nonetheless erred in failing to estop the government is inconsistent with that line of precedent and does not present a substantial issue for the Court's review.[6]

4. Petitioners' passing due process and statutory arguments are meritless and do not afford any basis for further review of the court of appeals decision. Petitioners argue in passing that the asserted destruction of their contract rights is a violation of due process. Pet.

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[6] In addition, the estoppel issue, like petitioner's remaining due process and statutory claims, is not identified as a "question presented." See Pet. I. It has therefore not been preserved for the Court's review. See Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

35. The court of appeals correctly found, however, that petitioners had no contract right to indemnification at quota rates. That holding is correct and does not implicate the due process principles petitioners advance here.

Petitioners' contention that the court of appeals holding undermines the congressional policies underlying the crop insurance program (Pet. 35) similarly fails to present any substantial issue for the Court's review. Congress repealed the peanut quota program and replaced it with new statutory programs involving direct cash payments to farmers, new price supports, a quota buy-out program, and a statutory increase in the indemnification rates paid for non-quota peanuts. Pet. App. 15a. Nothing in the court of appeals holding is inconsistent with the provisions of those statutes or their underlying congressional policy. There is thus no error in statutory construction warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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